

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF OHIO

3 WESTERN DIVISION

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5 UNITED STATES OF AMERICA, :
6 Plaintiff, : CRIMINAL NO. 1:16-CR-115
7 -vs- : Sentencing
8 RICHARD LEE DEVITO, : Tuesday, May 21, 2019
9 Defendant. : 10:03 a.m.
: Cincinnati, Ohio

10 - - -

11 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN J. DLOTT, JUDGE

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PROCEEDINGS

(In open court at 10:03 a.m.)

COURTROOM DEPUTY: United States of America versus
Richard Lee DeVito, Case Number 1:16-CR-115.

Could counsel and defendant please approach the
podiums?

THE COURT: Good morning to everyone.

Let me ask counsel to please enter their appearances
for the record and introduce anyone you have with you at
counsel table as well.

MR. HEALEY: Thank you, Your Honor. Good morning.
Kyle Healey on behalf of the United States. At counsel table
with me is Special Agent John Jones with the FBI.

THE COURT: Thank you, Mr. Healey.

MS. KOVOOR: Good morning, Your Honor. Sarah Thomas
Kovoor for the defendant, Richard DeVito, and Mr. DeVito stands
before me.

Also in the courtroom I have two witnesses, Dr. Connor
and Mr. Roger Pimentel who are planning to testify, as well as
the family members of Mr. DeVito.

THE COURT: All right. Are you Richard Lee DeVito?

THE DEFENDANT: Yes, I am.

THE COURT: And are you represented in this proceeding
by Sarah Kovoor, an attorney who's present here in court with
you today?

1 THE DEFENDANT: Yes.

2 THE COURT: Since you've got witnesses, do we want
3 them to testify first so that we don't have to keep them here
4 all day?

5 MS. KOVOOR: That would be wonderful, Your Honor, if
6 we could do that.

7 THE COURT: Okay. Why don't we go ahead and do that.
8 Let's take their testimony.

9 So you can be seated.

10 MS. KOVOOR: Okay.

11 THE COURT: And call your first witness.

12 MS. KOVOOR: Your Honor, we'd be calling Dr. Ed
13 Connor.

14 COURTROOM DEPUTY: Step up there and raise your right
15 hand and be sworn in.

16 (Witness complied.)

17 COURTROOM DEPUTY: You do solemnly swear that the
18 testimony you're about to give in this case will be the truth,
19 the whole truth, and nothing but the truth, so help you God?

20 THE WITNESS: I do.

21 COURTROOM DEPUTY: Thank you.

22 You can be seated, and the microphone bends.

23 THE WITNESS: Thank you.

24 Good morning.

25 THE COURT: Good morning.

1 You may proceed, Ms. Kovoov.

2 EDWARD JOSEPH CONNOR, PSY.D

3 DIRECT EXAMINATION

4 BY MS. KOVOOR:

5 Q. Good morning, Dr. Connor.

6 A. Good morning.

7 Q. Could you state your full name for the record?

8 A. Edward Joseph Connor.

9 Q. What is your educational background, Dr. Connor?

10 A. I was first trained in psychotherapy by the Institute of
11 Psychotherapy in Malmö, Sweden from 1982 to 1986. I graduated
12 from Thomas More College with my bachelor's degree in 1989. I
13 went to the University of Denver in Colorado where I earned my
14 doctorate degree in 1992. And I was with the University of
15 North Carolina and FCI Butner where I did my internship in
16 1993.

17 Q. Okay. Have you had any other training regarding dealing
18 with sexual offenders?

19 A. I have.

20 Q. What are that -- what is that?

21 A. Well, when I was at FCI Butner in North Carolina, I was on
22 the sex offender treatment unit and assessment unit.

23 Throughout the course of my career, I've attended different
24 trainings and sex offender risk assessments. I also conduct
25 the screenings for the Catholic Church and the Rabbi Union

1 College for candidates into the seminary.

2 Q. Okay. Have you testified before in federal court?

3 A. I have.

4 Q. Where?

5 A. In Kenton County, Kentucky. Here in Hamilton County, yes.

6 Q. Have those been recent?

7 A. Approximately a half a year ago I think I was in Hamilton
8 County federal court. About a year ago, I was in Kenton County
9 federal court.

10 Q. And you testified as an expert?

11 A. I have, yes.

12 Q. Okay. Have you published any articles in your field?

13 A. I co-authored a study using the Millon Clinical Multiaxial
14 Inventory in child custody evaluations, and also when I was at
15 FCI Butner, we -- I co-authored an article on identifying
16 malingering in criminal defendants that was published in the
17 Journal of Law and Human Behavior.

18 Q. Have you interviewed Mr. DeVito in this matter?

19 A. I have.

20 Q. Okay. And for what reason?

21 A. I was contacted by his attorney at that time to conduct a
22 psychosexual evaluation of him, which I did in June of 2017.

23 MS. KOVOOR: Your Honor, there was a stipulation by
24 the government regarding Dr. Conner's expertise, but I also ask
25 you to move -- I move that Dr. Connor be declared an expert in

1 this.

2 THE COURT: Any objection, Mr. Healey?

3 MR. HEALEY: No, Your Honor.

4 THE COURT: The Court will recognize Mr. -- I'm sorry,
5 Dr. Connor as a witness who is entitled to give an opinion.

6 Q. Dr. Connor, you've prepared a report in this matter;
7 correct?

8 A. Correct.

9 Q. Okay. And that was based on your evaluation of Mr. DeVito
10 on -- in 2017?

11 A. Correct.

12 Q. Okay. When did you see him and for how long and where?

13 A. I saw him at the Butler County Jail in Hamilton, Ohio on
14 June the 6th of 2017 for approximately three-and-a-half hours.

15 Q. Okay. And that is a different set amount of time than
16 what's stated in your report?

17 A. That is a mistake in the report. It says six, and it
18 should be approximately three-and-a-half, yeah.

19 Q. Okay. Now, you've reviewed your report?

20 A. I have.

21 Q. Prior to testifying today?

22 A. I have.

23 Q. Is there any other amendments that need to be made in this
24 report?

25 A. No. There's maybe a couple typos, but nothing that of

1 significance.

2 Q. Could you tell the Court what material were provided for
3 you to prepare this report?

4 A. Yes. I was provided the criminal complaint by his attorney
5 at that time.

6 Q. Okay. And did you have any other material besides what was
7 prepared -- given to you by the attorney?

8 A. That was the only document provided to me.

9 Q. When you interviewed Mr. DeVito, did he make any statements
10 to you that you found important in evaluating him in terms of
11 being a sex offender and his recidivism rate?

12 A. Yes, he did.

13 Q. Okay. What did you find important?

14 A. First of all, he was very disgusted with himself. He felt
15 that he had let down his family, himself, and he talked about
16 how he started to be involved in pornography in general at a
17 very young age, probably around age ten. He became obsessed
18 with pornography throughout his adolescent years and into his
19 adult years.

20 He tried to stop himself on a number of occasions due to
21 the self-disgust that he experienced, but, unfortunately, to no
22 avail. He was apprehensive about getting help because he was
23 afraid that if he went and sought help for this problem, that
24 he could be reported to the authorities because by that time,
25 he had also viewed underage pornography.

1 Q. Okay. Let me just back up a little bit here. You said he
2 had viewed child pornography when he himself was a child;
3 correct?

4 A. Correct.

5 Q. Could you describe that?

6 A. When he started to look at internet pornography at around
7 the age of 10 to 12, it was around that same time that he had
8 looked at underage pornography which would be consistent with
9 his age. He had a half-brother who had exposed him to this;
10 this is what he reported to me. But regardless, he had been
11 looking even at that time during those adolescent years. I
12 find this significant because of his age and looking at child
13 pornography that is consistent with his biological age set, I
14 think, in this trend of looking at a lot of underage
15 pornography as well as general pornography.

16 Q. Okay. Did he also report any abuse by the half-brother?

17 A. He did. He said that there was an incident of molestation
18 by the brother.

19 Q. He never reported that at the time; correct?

20 A. Correct.

21 Q. Okay. And he said no force was used?

22 A. That is correct.

23 Q. Okay. This was something that caused him embarrassment?

24 A. Yes.

25 Q. Okay. Did he also mention to you, admit how many

1 individual -- other individuals besides the victim that was
2 identified in the complaint was involved, that he was involved
3 with?

4 A. He did.

5 Q. What did he state?

6 A. He said that he had -- he estimated approximately 21
7 children that he had contacted online for sexually explicit
8 chat and exchange.

9 Q. Okay. And you said he was disgusted by his actions?

10 A. Yes.

11 Q. What did he state to you?

12 A. Well, he realized that he had a problem with not just
13 pornography but underage pornography, the explicit chats that
14 he engaged with other children, and it was a issue he felt he
15 couldn't really control. He felt like he didn't really
16 understand it, why he felt so compelled to engage in such
17 activity. So it seemed to be something that was rather
18 tormenting to him for quite some time.

19 Q. Okay. Is he a loner in terms of personality?

20 A. I think he is in the sense that one of the personality
21 assessments I gave him, he comes -- he's very elevated on what
22 we call an avoidant personality type. In other words, he seeks
23 relationships, but relationships cause him anxiety so he
24 withdraws from relationships, then he seeks again and then he
25 withdraws. So it's avoidance approach type relationships that

1 he seems to struggle with.

2 Q. Okay. But he had -- I mean, his family is in the courtroom
3 today. He has his mother and his wife here. Are you aware of
4 that?

5 A. That's my understanding, yes.

6 Q. Did he express any remorse as to what he was putting them
7 through?

8 A. Well, he did. As I stated earlier, he felt very disgusted
9 with himself that he let down his family and embarrassed his
10 family.

11 Q. You mentioned some tests that you did. Was there any
12 evidence of narcissistic personality?

13 A. No.

14 Q. Sociopathic personality?

15 A. No.

16 Q. Psychopathic personality?

17 A. No.

18 Q. What tests did you do?

19 A. I administer in terms of testing the Child Abuse Potential
20 Inventory because he is a -- he is a parent. And what we're
21 looking for here is character traits that we typically find in
22 people who are abusive toward children. And he responded in an
23 open and forthright manner, and it was interesting to note that
24 he's aware of how agitated he can get. When he gets stressed
25 out, he gets agitated. This is a trait that he would need to

1 be treated for to ensure that, you know, this type of agitation
2 would not be manifested with a hands-on type offense with his
3 child or any child.

4 The Millon Clinical Multiaxial Inventory, the Fourth
5 Edition, this is a psychometric-based assessment where we're
6 looking at the different types of personality disorders,
7 whether it's the avoidant personality disorder that I discussed
8 previously, the antisocial personality, the narcissistic
9 personality, the schizoid. So this is significant because men
10 who engage in this type of hands-on type behavior, if they go
11 that far, you're going to see more of a narcissistic,
12 antisocial type typically. But he was more elevated on the
13 dependent personality scale, so he tends to be more of a
14 passive type of offender.

15 There was nothing in his profile that had to do with
16 severe psychopathology such as psychosis or schizophrenia or
17 anything where there would be a concern about self-control or
18 self-management.

19 The other test I gave was the Abel Assessment for
20 sexual interest, the Third Edition. And this is an assessment
21 where the defendant is showed a total of 320 images. These are
22 four different age categories with both genders, and we're
23 measuring their visual response time unbeknownst to them. And
24 the theory is if we as a group were to walk through an art
25 museum, every individual would stop and look at a piece of

1 artwork based on what they find interesting, and then we can
2 measure how long they're looking at each piece of artwork, so
3 to speak. So that's the basic theory of the instrument. And
4 so we're measuring visual response time to four age categories,
5 both genders.

6 And on this instrument, he did come up very elevated
7 on an attraction to 6- to 13-year-old females. Now, this is
8 consistent with his history of viewing child pornography. And
9 based on the history and based on the test results, there are
10 indications of pedophilia.

11 Q. Were there any other age groups that he was attracted to?

12 A. There was a hebephilia interest, which is the adolescent
13 females, and there was also adult females. There was an
14 interest in adult females. So there were no interest in males.
15 There was the highest elevation was the young females, and then
16 the adolescent females, and then the third was the adult
17 females.

18 Q. To get his history and background, who did you speak to
19 besides Mr. DeVito himself?

20 A. His wife and his mother.

21 Q. Okay. How long did you speak to them?

22 A. I don't recall. It was on the telephone. I don't recall
23 how long.

24 Q. What was your understanding of his childhood?

25 A. Well, his mother talked about him being a good boy; that

1 she said that he did have a lot of anxiety even as a child, and
2 that would be consistent with his personality disorder that I
3 saw as an adult. And she said that he was exposed to a lot of
4 domestic violence which undoubtedly exacerbated his anxiety
5 even as a child.

6 Q. Can I stop you there?

7 A. Sure.

8 Q. Where did the domestic violence come from?

9 A. His father. His father perpetrated domestic violence
10 against his mother.

11 Q. And did that happen for a considerable period of time?

12 A. I don't recall how long that it did occur.

13 Q. Okay. Go on.

14 A. Well, she felt that if he were given the opportunity to
15 really seek the treatment that he had needed for many, many
16 years, that she believes that he would be okay and he could
17 overcome this problem that he has had since his adolescent
18 years with pornography.

19 Q. Do you concur with that opinion?

20 A. I'm sorry?

21 Q. Do you agree with her in that opinion?

22 A. I do in the sense that in my work within this field since
23 the mid '80s, when the internet came on into our society, what
24 we have seen is an explosion of people who have high levels of
25 anxiety and personality problems flee into cyberspace where

1 they sort of sedate themselves, if you will, with cyber -- in
2 cyberworld and they withdraw from contact with people.

3 Now, if you combine this with someone who has a trait of
4 pedophilia, now they're also going to spiral into the whole
5 pornography world and spiral down into the underage
6 pornography. So it's a combination of factors that in my work
7 with men who have been convicted and incarcerated, then
8 released for child pornographic possession, they work very well
9 in therapy. They seem to benefit from therapy. If it's a
10 prolonged therapy, group therapy, individual therapy, for at
11 least two years, then they can come to terms with the anxiety.
12 If they do have pedophilia, it's like giving someone a cancer
13 diagnosis but they know that they have it and they know they
14 have to control it, and we can teach them how to control it. I
15 can't say we can cure it, but I do say that we can teach them
16 how to control this.

17 Q. How do you teach them that?

18 A. Well, first of all, it has to be an acceptance of the fact
19 that they have pedophilia. This is something that they have
20 and they cannot act on it.

21 Q. And did Mr. DeVito accept that?

22 A. In my opinion, I believe he did. But I don't know for sure
23 because I only saw him the one time.

24 Q. Okay.

25 A. So I -- he -- I believe -- the reason I say I believe he

1 did is because he talked about how much he struggled with the
2 problem and how often he wanted to get help but felt that he
3 was hampered by the threat of being reported.

4 Q. Okay. Were there particular stressors in his life when
5 this happened because he was age 33 when -- when he was charged
6 with this conduct?

7 A. What he reported was that his father was very ill at the
8 time and that he assisted in the care of his father which
9 exacerbated his anxiety as well as his grief.

10 Q. Did his father pass away in the interim?

11 A. I believe he did, yes.

12 Q. Were there any other stressors, work, home?

13 A. He seemed to have a rather stressful life in general with
14 they had a baby recently, and then, of course, incarceration
15 and/or this case here. But he seemed to have -- be an
16 individual who often was easily stressed into high levels of
17 anxiety.

18 Q. Okay. What I'm referring to particularly is at the time
19 that he was involved in this conduct of reaching out to young
20 girls, was he going through any particular stressors at that
21 time because prior to 2016, he's never been charged with any
22 such conduct; correct?

23 A. That's my understanding, Yes.

24 Q. He's a first-time offender?

25 A. Yes.

1 Q. So what do you know, if you do, what particular stressors
2 were going on at that time when he was involved in that
3 conduct?

4 A. Other than his father's illness, I'm not aware of anything.

5 Q. The phone. The phone was the tool that was used here.

6 During your years of working in the Federal Government and in
7 programs regarding sex offenders, what is your understanding of
8 the use of the phone, the availability, and how that can affect
9 a person's treatment?

10 A. One of the things that we teach our patients about about
11 this is we call it the triple A factor. You have
12 accessibility. Pornography in the zeitgeist is so incredibly
13 accessible; it's just a click of a button away. We also have
14 affordability, which it's incredibly affordable. There's
15 essentially no cost at times to access any type of pornography.
16 And the third and most powerful variable in this type of
17 obsessive, addictive behavior is anonymity. So in other words,
18 no one knows who you are when you're doing this. You can do it
19 in the closet or in the bedroom, the bathroom, wherever, and no
20 one knows who you are. So when you combine these three
21 variables with the preexisting addictive behavior, it becomes
22 incredibly powerful and difficult to overcome.

23 Q. So if that phone is taken away or it's monitored, can that
24 affect an individual's behavior?

25 A. Yes. In my treatment program with sex offenders, we work

1 very, very closely and very well with the federal probation
2 officers and the state probation officers, and they monitor any
3 phones, if they're even allowed to have a phone. I don't allow
4 them to have a phone until they've been in treatment for some
5 time until I feel like they've reached a level of
6 self-regulation where they can responsibly even have a cell
7 phone. If they have any type of internet access through a
8 computer, that is monitored by the federal or the state
9 probation officers.

10 So we have a lot of monitoring availability now that we
11 didn't have maybe five or six years ago, certainly back in the
12 '90s. The technology has evolved, and I'm certainly not a
13 technological person by any means, but the technology has
14 evolved to the point where we can closely monitor men who have
15 been convicted of these types of offenses who have no hands-on
16 offense.

17 Q. And what is the recidivism rate in general for child
18 pornographers?

19 A. Well, a meta-analysis of nine different studies recently
20 suggests that it's about 5 percent. Now, that's if they're
21 treated. And all my estimates about recidivism are based on if
22 a person is in treatment. If a person is not in treatment, of
23 course, they will be high risk. But if a person is in
24 treatment and is committed to treatment, then we could have
25 anywhere from 5 percent. Some research would say higher. But

1 it's difficult to say exactly, but certainly anywhere from the
2 5 probably up to about the 18 percent range.

3 Q. And I'm going to just refer to your report. You felt that
4 Mr. DeVito was a candidate to have in fact even community
5 treatment?

6 A. Yes. Based on my training and experience with men who have
7 been convicted of this type of offense, and his profile, I
8 believe that he would be a candidate for a community-based
9 treatment program with proper probationary guidelines and
10 monitoring by the Probation Office.

11 Q. Okay. Now, in your report you specifically stated that,
12 and this was in June of 2017, that Mr. DeVito did not blame
13 anybody else for his actions; correct?

14 A. That's correct.

15 Q. What did he state to you?

16 A. Well, I talked with him, like I do with many of or all of,
17 I should say, the individuals I evaluate or treat about
18 responsibility and if they accept responsibility for their
19 offense, and he didn't blame anyone but himself. He didn't try
20 to blame it on his stress. He did not try to blame it on the
21 abuse he reportedly sustained by the half-brother. He didn't
22 try to say anything except he was responsible and he needed
23 help for this problem.

24 Q. Okay. The abuse by his half-brother, did he state to you
25 that that just gave him more of an interest in pornography?

1 A. He didn't seem to connect the physical abuse by his brother
2 or the sexual abuse by his brother and the pornography. It was
3 more so that that's how he was introduced to pornography, by
4 the brother or half-brother. But he didn't -- he didn't -- I
5 didn't get the impression that he was trying to connect the
6 abuse with pornography.

7 Q. Does he have any obsessive compulsive traits?

8 A. Well, certainly with pornography. He would masturbate
9 sometimes up to two or three times a day during his adolescent
10 years and spend a couple hours a day on pornographic websites,
11 and this persisted sometime into his adulthood too with a
12 obsessive-compulsive behavior in that regard.

13 Q. Is he an intelligent man?

14 A. I think he is, yes.

15 Q. Is he college educated?

16 A. I believe so, yes.

17 Q. Was he working at the time of the offense?

18 A. He was.

19 Q. And in a management position?

20 A. Yes.

21 Q. What was your understanding of his drug and alcohol
22 history?

23 A. Let me just double-check.

24 He never reported having an alcohol problem. And I checked
25 with his wife to make sure, and to her knowledge, he had never

1 had any kind of an alcohol problem. They would have a mixed
2 drink once in a while. He never used any type of illegal drug,
3 including marijuana, and which was -- or he never abused
4 prescription medications or inhalants, and these statements
5 were also independently confirmed by his wife.

6 Q. What about his mental health history besides what you've
7 stated already?

8 A. Well, unfortunately, he never received any type of mental
9 health treatment, which he should have as an adolescent, but he
10 was never properly medicated, he never received psychotherapy.
11 And as I stated previously, he knew he needed help, but he
12 didn't -- never went.

13 Q. Did he undergo chronic depression?

14 A. Yes.

15 Q. Was he ever treated for that?

16 A. No. He was never treated for any of his psychiatric
17 disorders.

18 Q. His neurological history?

19 A. There was no head traumas. There were no incidents of
20 traumatic brain injury.

21 Q. Okay. His psychometric test results besides what you've
22 stated today, is there any other information that you feel that
23 is important to provide to this Court? And we can go over it
24 quickly, if you'd like, the -- there's a Child Abuse Potential
25 Inventory that you used.

1 A. No, I think everything we've said so far has pretty much
2 summed up his profile, if you will.

3 Q. You did four tests; correct?

4 A. Well, the Child Abuse Potential Inventory, the Millon, and
5 then the Abel Assessment would be three actual tests. And then
6 the guidelines, the risk guidelines, are nothing more than just
7 a guideline to follow. They're not actual tests per se.

8 Q. Okay. And your conclusion was he's a low risk to reoffend.
9 Could you explain that to the Court?

10 A. Sure. If he was properly treated in a treatment program or
11 properly monitored by the federal Probation Office, I believe
12 that he is at low risk to reoffend. And I base that opinion
13 not only on the research but also on the fact that he
14 acknowledged that he needs help. He acknowledged that he has a
15 severe problem. He acknowledged that he had a sexual interest
16 in minors, females; that he was disgusted by himself. So
17 there's a lot of factors in just that that suggest that he
18 would be a good candidate.

19 The other thing that's important to look at is there is no
20 history of criminality. We don't see a pattern of criminality
21 here other than the repeated same behaviors, the
22 obsessive-compulsive behaviors of pornography use and underage.
23 That could in and of itself maybe constitute a pattern, but
24 there's not a diversity of criminality that we see with men who
25 typically reoffend.

1 There's no severe psychopathology, such as I said earlier,
2 there's no psychosis, there's no schizophrenia, there's no
3 bipolar disorder, things like this, and there's no drug or
4 alcohol issue that we have to deal with. It's pretty much a
5 targeted item here with his treatment.

6 Q. Does the supportive family affect how an individual's
7 treatment proceeds?

8 A. Absolutely, yes.

9 Q. How is that?

10 A. Well, in the research on men who commit different types of
11 sex offenders -- offenses, one of the things that we're looking
12 at is attachment deficits. When they have attachment deficits,
13 when they have poor relationships, they're more likely to act
14 out sexually. They're more likely to reoffend. So if you have
15 a patient who has a lot of family support, that compromises the
16 attachment deficit, so that increases the probability of
17 successful treatment.

18 Q. Okay. So all of the opinions you stated today as well as
19 in your report you can state to a reasonable degree of
20 psychological certainty?

21 A. Yes.

22 Q. Okay.

23 MS. KOVOOR: One moment, Your Honor.

24 (Ms. Kovoer conferring with the defendant.)

25 MS. KOVOOR: Thank you.

1 THE COURT: Thank you, Ms. Kovoov.

2 Mr. Healey, would you like to cross-examine?

3 MR. HEALEY: Thank you, Judge.

4 THE COURT: You may proceed.

5 CROSS-EXAMINATION

6 BY MR. HEALEY:

7 Q. Good morning, Doctor.

8 A. Good morning.

9 Q. So how long did you speak with Mr. DeVito?

10 A. Probably about three-and-a-half hours.

11 Q. And was this in person or over the phone?

12 A. In person.

13 Q. In person. What was his demeanor when you spoke to him?

14 A. Very somber. Remorseful. Ashamed.

15 Q. And prior to meeting with him, you said you reviewed the
16 criminal complaint in this case?

17 A. Correct.

18 Q. Did you review any of the other evidence in the case as far
19 as his other conduct?

20 A. No, sir. That was the only information given to me.

21 Q. And so the criminal complaint involved approximately four
22 days of conduct with one minor, is that what you recall?

23 A. I believe so, yes.

24 Q. And you had indicated that Mr. DeVito acknowledged that he
25 had engaged in such conduct with up to as many as you believe

1 21 other minors?

2 A. That was his estimate, yes.

3 Q. Did he say the age of those minors?

4 A. They varied from, I believe, as low as eight to early
5 teens.

6 Q. And you mentioned that this behavior consisted of being in
7 chat rooms?

8 A. Yes.

9 Q. What do you understand that to mean?

10 A. Well, he would make explicit chats to these minors, and
11 there was also like images being viewed where he would talk to
12 them about engaging in different activity.

13 Q. Did he tell you that he actually did live Facetime videos
14 with these minors?

15 A. That would be the correct term, yes.

16 Q. So it's not actually chatting, I mean, it's a face-to-face
17 conversation through the screen?

18 A. Yes.

19 Q. So it's much different than just sending a text message to
20 someone; right?

21 A. That's right, yes.

22 Q. Did he explain what he would show the minors to you?

23 A. He would talk about wanting to show them his genitalia,
24 asking them to show theirs, and get them to engage in different
25 sexual acts.

1 Q. Did he explain to you how he would show them pornography as
2 well?

3 A. I don't recall how he did it technically, but there were
4 some comments to that.

5 Q. And you explained that showing pornography to someone, in
6 your report, I think, showing pornography to someone at a very
7 young age, that can be detrimental to their sexual development
8 later in life?

9 A. Yes, sir.

10 Q. I mean, that's exactly what happened to Mr. DeVito; right?
11 He claims that he was subjected to child pornography at the age
12 of eight?

13 A. At ten, I believe.

14 Q. Ten?

15 A. Yes.

16 Q. And so that conduct creates a lot of problems later in life
17 based on your research or based on research that you're
18 familiar with?

19 A. Absolutely, yes.

20 Q. Did he tell you who he pretended to be when he was online?

21 A. A female, I believe 13-year-old female.

22 Q. Did he tell you how many communications he'd typically have
23 with a minor? Was this just a one-day thing, a one-chat thing?

24 A. No. This went over on a -- over a period of time. He
25 estimated approximately 21 different interactions with a

1 person.

2 Q. And how long were those interactions, though?

3 A. I don't know.

4 Q. Would it change your assessment at all to find out that
5 Minor Victim A he interacted with for four weeks?

6 A. It wouldn't change my opinion in terms of his risk level.
7 But, again, that's premised upon if in fact he's in treatment.
8 Now, if he were not in treatment, then yes.

9 Q. If he exchanged 2,400 messages with an eight-year-old in
10 that -- with the victim in that case over the four weeks, would
11 that change your assessment at all?

12 A. If he were in treatment, no, sir.

13 Q. If he got 37 videos of sexual exploitation from that minor
14 during that four-week span, would that change your evaluation
15 at all?

16 A. If he were in treatment, no, sir.

17 Q. Do you look at their offense conduct at all as far as what
18 they're attempting to get these minors to do? Does that matter
19 at all in your evaluation?

20 A. Yes, it does.

21 Q. Did he explain to you that he tried to use the minors to
22 recruit their relatives?

23 A. No, he did not.

24 Q. Why would that be significant to you?

25 A. Well, it would go beyond just interacting with the minor.

1 Then he would be putting the minor in a position where they are
2 going to exacerbate his own deviancy and put them in a very
3 uncomfortable situation to try to recruit people to do the same
4 thing.

5 Q. And how would that affect your evaluation?

6 A. I would have to consider that more and I would have to talk
7 with him more about that, and it could, but I can't say at this
8 time.

9 Q. What if he encouraged the minor to perform oral sex on her
10 father so he could see it?

11 A. That would, of course, be very concerning, yes.

12 Q. I'd like to talk to you a little bit about what you
13 reference in your report as the cognitive distortion score.

14 A. Yes.

15 Q. Can you explain what that is?

16 A. Men who are sexually involved with children have distorted
17 thinking patterns. In other words, they don't always fully
18 understand the degree of devastation emotionally,
19 psychologically that this can have on a child, and they use
20 these thought patterns as a way to justify or minimize or
21 rationalize their behaviors. These are defense mechanisms that
22 they use to engage in a behavior.

23 And on his cognitive distortion score, it was in, I
24 believe, the problematic range. So this is a area of treatment
25 that needs to be targeted. In fact, it was at 31 percent, and

1 scores between 26 and 39 percent are considered problematic.

2 So it's a way to justify the behavior.

3 Q. And so that justification of a behavior, that's a potential
4 problem going forward, is that what you're --

5 A. Yes, sir.

6 Q. -- saying?

7 A. Yes.

8 Q. Can we just talk briefly just the dynamics between a
9 30-year-old man having a conversation with an eight-year-old.
10 I mean, you would agree logic dictates that, I mean, the
11 30-year-old is effectively in control of that conversation?

12 A. I agree.

13 Q. Is it a justification, I guess would it raise the
14 distortion score if you knew that Mr. DeVito wanted the minor
15 victim to come because he felt that he didn't actually induce
16 her to make those photos?

17 A. Well, the discortion -- the distortion score is based on
18 his responses to the various questions about the impact the
19 child molestations or sexual activity with a child and an adult
20 can have on the child, so those are his scores. I don't apply
21 the score myself.

22 Q. I guess what I would ask, then, is is blaming the
23 eight-year-old conduct that would be consistent with that
24 cognitive distortion score, right, you're effectively --

25 A. I understand, yes. Yes, it would be.

1 Q. Now, you had indicated that Mr. DeVito admitted and
2 seemingly tested that, you know, he's attracted to minors from
3 the ages of 16 seemingly all the way up to 17?

4 A. Well, that was his secondary attraction.

5 Q. The primary attraction was, I'm sorry?

6 A. With children between the ages of six and 13.

7 Q. And that this started at a young age with him?

8 A. Yes.

9 Q. And so in layman's terms, it's females between the ages of
10 six and 13 that sexually stimulate him, that he fantasizes
11 about; is that correct?

12 A. Correct.

13 Q. Now, the treatment that's available, it doesn't actually
14 like rewire the defendant's thought process, like he's not in
15 the future going to not be attracted to those women through
16 treatment; it just manages it?

17 A. I think that's a fair way of saying it. We can't take away
18 an attraction per se, but we certainly can help people learn
19 how to manage the attraction.

20 Q. Now, you had also mentioned in your memo, you've actually
21 worked, I believe, in the Bureau of Prisons for a while; is
22 that correct?

23 A. Yes, I did, in FCI Englewood, Colorado and then in FCI
24 Butner, North Carolina.

25 Q. The time you were at Butner, I mean, that was the Bureau of

1 Prisons' largest mental health facility; is that correct?

2 A. Yes.

3 Q. The Bureau of Prisons, I think you even wrote in your memo,
4 I mean, they're perfectly capable of providing adequate
5 treatment to Mr. DeVito, in your estimation?

6 A. Absolutely.

7 Q. You had referenced as part of what your treatment plan for
8 him would include polygraphing. Why?

9 A. Why would it?

10 Q. Yes.

11 A. Yes. Well, it's another level of safety; that the
12 probation officers will ask me if there's any questions that I
13 want to have the examiner or the polygrapher ask the defendant
14 or the probationer in the polygraph. If you can work together
15 with the probation officers about what needs to be targeted, it
16 provides another level of safety primarily for the community.

17 Q. To your knowledge, has Mr. DeVito been polygraphed yet
18 about his conduct?

19 A. I do not know.

20 Q. You're familiar with some of the studies that have come out
21 about the results of polygraphing admitted sex offenders;
22 right?

23 A. I do.

24 Q. And the studies generally show that after a polygraph
25 examination, they tend to admit to multiple -- or more victims

1 than they initially admitted to?

2 A. Well, the what's referred to as the sexual disclosure
3 polygraph?

4 Q. Yes.

5 A. In the initial stages of treatment, that does seem to be
6 accurate, yes.

7 Q. Are you familiar with the studies that indicate they also
8 tend to overstate their own sexual victimization?

9 A. I am not familiar with that study.

10 That they overstate their own sexual victimization, is that
11 what you're saying?

12 Q. Yes.

13 A. On the polygraph?

14 Q. Yes.

15 A. I am not familiar with that study.

16 Q. One of the things that you noted was that you wouldn't
17 allow Mr. DeVito to have access to a cell phone during
18 treatment?

19 A. Absolutely not in the initial stages anyway.

20 Q. Why would that be the case?

21 A. Well, because of the, as I said earlier, the -- we call it
22 the Triple A engine, the affordability, the accessibility, and
23 the anonymity of accessing pornography. It would be like
24 having an alcoholic go into a bar and say don't have a drink.
25 It's just not clinically appropriate.

1 Q. And I want to word this question artfully, Doctor, but --

2 A. Sure.

3 Q. -- what I'm asking is, you know, you put a pretty big
4 caveat in your report which is this isn't an exact science, is
5 that a fair way to say, the work that you do?

6 A. I think it's absolutely fair, yes.

7 Q. So he could do well with treatment, he could not do well
8 with treatment, you just don't know until you start; is that
9 correct?

10 A. That's correct.

11 MR. HEALEY: Just a second, Your Honor.

12 I have nothing further. Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Healey.

14 Do you have any redirect examination, Ms. Kovoov?

15 MS. KOVOOR: Yes.

16 THE COURT: You may proceed.

17 REDIRECT EXAMINATION

18 BY MS. KOVOOR:

19 Q. Dr. Connor, you mentioned your work with the Federal Bureau
20 of Prisons?

21 A. Yes.

22 Q. When would an individual who is charged and convicted of a
23 sex offense start getting treatment?

24 A. In my opinion, as soon as I possibly can. I would prefer
25 that as soon as they're arrested, that the next day they start

1 treatment because they're emotionally quite raw at the time and
2 filled with a lot of angst, and so that makes them prime to
3 really start to open up about the problems they've been having.

4 Q. Is that the general practice in federal prisons today?

5 A. My understanding -- well, I can only speak when I was at Butner.
6 It was the last two years of their sentence that they were
7 accepted into our treatment program.

8 Q. Okay. So the longer the sentence, the longer the delay in
9 treatment; is that correct?

10 A. Yes.

11 Q. Which is counterproductive to the person's progress?

12 A. Well, I can only speak clinically. Clinically speaking,
13 the longer you wait, the more the defense mechanisms start to
14 seat back into the psyche. So as soon as they are able to get
15 in treatment, as soon after the offense, is when I prefer to
16 start treatment.

17 Q. Okay. Now, we mentioned -- Mr. Healey mentioned
18 pedophilia. Mr. DeVito didn't choose to have an attraction to
19 young females?

20 A. Well, the research is emerging that this is not as much of
21 a choice as maybe what we once thought. Dr. Klaus Beier at the
22 Berlin Institute of Sexology is leading some of this research
23 in Berlin, Germany that it's -- it -- I've never had a patient
24 tell me that they wanted to be a pedophile. That's something
25 that, like I said earlier, it's like giving a cancer diagnosis;

1 it's not something they want.

2 Q. But somebody who accepts the conduct would be a better
3 candidate for successful treatment; correct?

4 A. Well, acceptance of the conduct is imperative to the first
5 step of treatment.

6 Q. And, Mr. DeVito, while he was talking to you, even
7 mentioned spontaneously that there were approximately 21 other
8 girls that he had contacted?

9 A. Yes.

10 Q. Okay. He expressed to you the remorse he had as to his
11 actions and what he did to these girls?

12 A. The remorse and the self-disgust.

13 Q. And he also expressed remorse as to what he did to his
14 family?

15 A. Correct.

16 Q. Now, regarding polygraphs, did you ever get any
17 investigator's files regarding polygraphs?

18 A. I did not.

19 Q. Okay. Did you get any evidence from the prosecutor
20 regarding chats?

21 A. No.

22 Q. Okay. So you're going by the complaint and the affidavit
23 provided by the investigator; correct?

24 A. Correct.

25 Q. That was submitted to you as well?

1 A. Yes.

2 Q. Okay.

3 A. Well, not the affidavit. The criminal complaint.

4 Q. Together with the affidavit of --

5 A. With that, yes.

6 Q. -- Agent Jones?

7 Okay. And that delineated the steps of the investigation
8 and the ultimate arrest of Mr. DeVito; correct?

9 A. Correct.

10 Q. Okay. When you were referring to polygraphs, were you
11 referring to the probation officer's ability to use polygraph
12 as a tool?

13 A. As a treatment tool, yes.

14 Q. Is that correct?

15 A. Yes.

16 Q. Okay. And that would be a way to monitor somebody who is
17 no longer incarcerated?

18 A. Correct.

19 Q. Okay. And that also registration also helps; is that
20 correct?

21 A. Yes.

22 Q. Okay. 'Cause you know where the person's whereabouts is?

23 A. Correct, yes.

24 Q. What other tools do they use at the federal prison level?

25 A. Well, we are frequently in contact with one another about

1 the person's behavior and conduct with the Probation Office,
2 their engagement in treatment, their progress in treatment.
3 Again, the polygraphs. We have face-to-face meetings with the
4 officers. So it's a very tightly monitored, I think,
5 combination of Probation and treatment.

6 Q. So basically they do a very good job of monitoring
7 ex-convicts who are sex offenders?

8 A. I think they do an excellent job.

9 Q. Okay. Now, regarding sexual abuse and reoffending, do you
10 find that specifically boys are less apt to tell if they've
11 been abused by another male?

12 A. I do.

13 Q. Are they more ashamed of being a victim in that situation?

14 A. If they are abused by a male, yes.

15 Q. Why is that?

16 A. Boys who get sexually molested by another male have a fear
17 that that could make them homosexual. They have a fear that if
18 they had any type of arousal during the molestation from a
19 male, that that means that they have an attraction to male when
20 essentially that is nothing more than a physiological response
21 to tactile stimulation. So there's a lot more shame
22 associated. And we teach boys to not tell, to be strong,
23 whereas I think we socialize females that if someone touches
24 you, to make sure you tell us, but that doesn't always work
25 either.

1 But to answer your question, boys have a much more, I
2 think, difficult time with this because if it's a male
3 perpetrator.

4 Q. Does the fact that the perpetrator here was an older
5 half-brother have any effect on an individual's -- if it's a
6 family member who's the offender, does that affect the person's
7 ability to tell?

8 A. If it's a family member, it affects their willingness to
9 tell more because they don't want to cause the family problems
10 so they tend to keep it to themselves.

11 Q. So there's nothing unusual about Mr. DeVito keeping his
12 abuse secret?

13 A. No. And I would add that at no time did I get the sense
14 that Mr. DeVito was using his own molestation as some type of
15 explanation or excuse for what he did. I think those are two
16 separate factors.

17 Q. And did you ever find any malingering or -- in interviewing
18 Mr. DeVito for three-and-a-half hours?

19 A. No, not in my interviews. And the tests that we give have
20 what we call social desirability scales where they -- where we
21 can look and see if they are being forthright.

22 Q. Okay. And you found him forthright?

23 A. I did.

24 Q. And you found him willing and wanting treatment?

25 A. Absolutely.

1 Q. Thank you.

2 THE COURT: Mr. Healey, any recross examination?

3 MR. HEALEY: Just one quick point.

4 RECROSS EXAMINATION

5 BY MR. HEALEY:

6 Q. Doctor, you had said you got evidence from myself and Agent
7 Jones. You didn't actually get it from us?

8 A. No, sir.

9 Q. You got it from DeVito's lawyers?

10 A. That's correct.

11 Q. You've never spoken to us prior to today?

12 A. No, sir.

13 Q. Okay. Thank you.

14 THE COURT: Thank you.

15 Anything further, Ms. Kovoor?

16 MS. KOVOOR: No, Your Honor.

17 THE COURT: Dr. Connor, the Court appreciates your
18 coming here and testifying. You are excused.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: You have one more witness, Ms. Kovoor?

21 MS. KOVOOR: I have one more professional witness and
22 I have one lay witness, Your Honor.

23 THE COURT: All right. Why don't we hear from the
24 professional witness.

25 MS. KOVOOR: Your Honor, I call Roger Pimentel.

1 THE COURT: Would you spell the last name?

2 MS. KOVOOR: P-I-M-E-N-T-A-L.

3 THE COURT: P-I-M --

4 MS. KOVOOR: -- E-N --

5 THE COURT: -- E-N --

6 MS. KOVOOR: -- T-A-L.

7 THE COURT: -- T-A-L.

8 COURTROOM DEPUTY: Step up there, raise your right
9 hand, and be sworn in.

10 (Witness complied.)

11 COURTROOM DEPUTY: You do solemnly swear that the
12 testimony you're about to give in this case will be the truth,
13 the whole truth, and nothing but the truth, so help you God?

14 THE WITNESS: I do.

15 COURTROOM DEPUTY: Thank you. Please be seated.

16 ROGER PIMENTEL

17 DIRECT EXAMINATION

18 BY MS. KOVOOR:

19 Q. Good morning, Mr. Pimentel.

20 A. Good morning.

21 Q. Could you state your name?

22 A. Yes. Name is Roger Pimentel. And I'd like to correct the
23 spelling. It is P-I-M-E-N-T-E-L.

24 Q. I apologize.

25 Mr. Pimentel, could you tell the Court why you're here

1 today?

2 A. I am a mitigation investigator and sentencing consultant,
3 and I've been retained by your office.

4 Q. Okay. Could you tell the Court your educational
5 background?

6 A. I have a master's degree in public policy with a emphasis
7 in criminal justice policy.

8 Q. What about your work history?

9 A. I was a United States Probation and Pretrial Officer for
10 over ten years. Prior to that, I was a local county probation
11 officer.

12 Q. Okay.

13 A. So over 20-plus years of work in probation and corrections.

14 My expertise over those 20 years, especially in the federal
15 system, was with sexual exploitation offenders, child
16 pornography offenders. That expertise included creating,
17 helping, and co-chairing a work group that created national
18 policies for sex offender management, also creating policies
19 for the American Probation and Parole Association, training
20 Federal Courts in the Northern District of California and also
21 in the Central District of California, and hundreds and perhaps
22 even thousands of probation officers throughout the country.

23 Q. Okay. Let me specify where you've testified. Have you
24 testified before the United States Sentencing Commission?

25 A. I have.

1 Q. In what capacity?

2 A. In my role as on the sex offender management work group, we
3 provided great guidance and consultation to the Sentencing
4 Commission on sex offender management issues.

5 Q. Okay. Have you taught at seminars?

6 A. Yes.

7 Q. What kind?

8 A. I have taught at seminars for the American Probation and
9 Parole Association, the Federal Probation and Pretrial
10 Officers' Association, for judges at annual seminars.

11 Q. Federal judges?

12 A. Yes. Local judges as well. For the National Pretrial
13 Association, for the California Coalition on Sexual Offending,
14 also for the Association of Treatment of Sexual Abusers, ATSA.
15 So quite a bit of training and education.

16 Q. How about the Bureau of Prisons or the Department of
17 Justice?

18 A. Bureau of Prisons, we did provide some guidance and worked
19 with them. It was more on a one-on-one basis while in
20 Washington, D.C. working for the work group, the work group
21 which was commissioned by the Administrative Office of the
22 United States Courts.

23 Q. Okay. And the Department of Justice?

24 A. My work with the Department of Justice is related to
25 training seminars sponsored by the Federal Bureau of

1 Investigation and the United States Marshal Service, mostly in
2 the Central District of California.

3 Q. Okay. Have you published any articles?

4 A. I've co-authored three articles. One on the -- on the
5 containment approach to sexual defendants in the community, one
6 on the sentencing processes facing sexual offenders, and an
7 article on suicide prevention for indicted pretrial defendants.

8 Q. Okay. Have you testified in any courts as an expert?

9 A. I've testified in every federal circuit in the country
10 throughout a variety of different District Courts.

11 MS. KOVOOR: Your Honor, I would move that Dr. -- I
12 mean Mr. Pimentel be declared an expert in this matter.

13 THE COURT: Any objection?

14 MR. HEALEY: What is the matter that he's being
15 declared an expert in?

16 MS. KOVOOR: Just regarding the guidelines sentencing.

17 MR. HEALEY: Regarding the sentencing guidelines,
18 that's fine, Your Honor.

19 THE COURT: All right. The Court will recognize
20 Mr. Pimentel under Federal Rule of Evidence 702 as an expert
21 qualified to talk about the sentencing guidelines.

22 MS. KOVOOR: Thank you, Your Honor.

23 Q. Could you tell -- well, first of all, you said you were
24 retained by Mr. DeVito; correct?

25 A. Yes.

1 Q. Okay. Could you tell the Court what you did once you were
2 retained?

3 A. The first step was to review all of the discovery that was
4 provided by your office which included the charging documents,
5 investigative reports, the presentence report, items -- almost
6 everything with the exception of any images or anything like
7 that.

8 Q. Okay. Did you have an opportunity to interview any
9 individuals?

10 A. Yes. I had the opportunity to speak to Mr. DeVito by
11 phone. I had the opportunity to speak to his mother and also
12 his wife briefly.

13 Q. Okay. Did you get background information?

14 A. Yes.

15 Q. What information did you get?

16 A. I compiled his complete social history, his employment
17 history, his education history, medical issues, and essentially
18 the type of work that a presentence investigator would do. And
19 this information was used in support of the sentencing
20 memorandum that was submitted.

21 Q. So you helped prepare or gave input to the sentencing
22 memorandum that was filed with this Court?

23 A. Yes.

24 Q. Okay. Tell me a little bit of background that Mr. DeVito
25 had prior to being charged.

1 A. Well, I mean, his background, it is stated in the papers,
2 but, I mean, it's -- he's a first-time offender. He was
3 employed. He was a family man. He is college educated. And I
4 also learned about his addiction to pornography which
5 correlated or led to his sexual offending in this case.

6 Q. Okay. Now, based on your experience and training, how do
7 the Sentencing Guidelines impact Mr. DeVito's case?

8 A. Well, the guidelines are -- have been criticized for many
9 years, and at the basis of the criticism is the fact that the
10 guidelines are not supported by empirical evidence. And what
11 typically happened with guidelines or a set of guidelines is
12 that Congress would submit their recommendation to the
13 Sentencing Commission, the Sentencing Commission would then
14 feather this out to a group of experts, research it, make their
15 recommendation.

16 With child pornography guidelines, since the early '90s
17 Congress has directly imposed the guidelines without seeking
18 research or support by the Sentencing Commission. And, in
19 fact, in the most recent addendums to the Sentencing
20 Guidelines, the PROTECT Act and the Adam Walsh Act, the
21 Sentencing Commission was opposed to the increases to the
22 penalties in these provisions because the issues were not
23 properly researched.

24 Q. Could you explain to the Court what you mean by problems
25 with the guidelines in child pornography cases?

1 A. Well --

2 Q. First of all, you've got people who are running for elected
3 office dictating guidelines; is that correct?

4 A. Yes. The guidelines for sexual offenders are often
5 politically motivated. It is not uncommon for congressmen to
6 submit Bills during an election year encouraging the increase
7 in penalties for sexual offenders.

8 And, you know, unfortunately, what has happened is that
9 things get researched and things get looked at a lot closer
10 down the road, and Congress doesn't -- they don't back things
11 up once -- once things happen. For example, sexual offender
12 registration which is now available in the federal system,
13 there's much -- there's much study and debate about this issue
14 that it actually increases potential recidivism for sexual
15 offenders because it limits where they can live, it limits
16 where they can work, it limits where they can recreate, and
17 this creates, generally speaking, a higher-risk offender
18 potentially.

19 Q. Well, let me go to specifically to Mr. DeVito's presentence
20 report.

21 A. Yes.

22 Q. You reviewed it?

23 A. Yes.

24 Q. You reviewed the objections to it?

25 A. Yes.

1 Q. And the responses by the government?

2 A. Yes.

3 Q. Okay. Could you specify what problems you found?

4 A. Well, in Mr. DeVito's case, the -- some of the challenges,
5 you know, in his case have to do with the enhancements. For
6 example, the underage 12 enhancement. This is an enhancement
7 that, according to the Sentencing Commission, is used in 96
8 percent of cases. It's almost an element of the offense. It's
9 almost double counting. So that is an issue that stacks the
10 enhancement or stacks the potential range.

11 Similarly, the use of a computer which adds two additional
12 levels, that is a -- in today's world, every -- almost every
13 single child pornography case is a -- is with the use of a
14 computer. And, you know, there's a local -- or there's a
15 District Court, I believe, that indicated in disagreeing with
16 the computer policy or the computer enhancement, they indicated
17 that it's the equivalent of giving an individual a speeding
18 ticket and then giving them an additional fine for using a
19 vehicle. It's an element of the offense. So that is an issue.

20 The enhancements for the number of images; 600 images
21 now creates a five-level bump. That is -- when that was
22 originally created, it took a lot of work for an individual to
23 actually collect 600 images. In today's world with technology,
24 that is a single click of the mouse. So the guidelines have
25 not kept up with the technology.

1 Q. So you're saying that somebody clicking a mouse once may be
2 less culpable than somebody who's going out there and
3 retrieving pictures and mailing it or doing the work for 600
4 images --

5 A. Yes.

6 Q. -- to be produced?

7 A. It is much easier to collect vast amounts of child
8 pornography in today's world which is a factor in terms of the
9 enhancements because the original idea of the enhancements was,
10 you know, 600 images was either very slow dial-up internet or
11 was the actual physical pursuit of child pornography images,
12 whether that's going by mail order or, you know, some other
13 nefarious way.

14 Q. Okay. What about the use of sadomasochistic images?

15 A. Yeah. "Sadomasochistic images" has a very broad definition
16 which essentially encompasses all types of child pornography.
17 It's described in the Federal Code with penetration and
18 sexually explicit conduct, and that exists in almost every
19 image of child pornography that's out there.

20 Q. So in essence, what are you saying to this Court regarding
21 the enhancements?

22 A. Well, the enhancements have been criticized, as the
23 guidelines have been, and --

24 Q. By whom?

25 A. By, well, in general by Courts just based on the degree --

1 the rate that they are not sentencing within the guidelines.

2 Q. What do you mean by that?

3 A. For example, in production cases, across the country Courts
4 are sentencing defendants at a rate of about 52 percent only
5 within the guidelines. So 48 percent are varying from the
6 guidelines. Within that 52 percent, it being 52 percent that's
7 being sentenced within the guidelines, a large majority of
8 those individuals are what's called remote producers of child
9 pornography which is exactly the case with Mr. DeVito.

10 Q. What do you mean by that, remote producers?

11 A. What I mean is that Mr. DeVito did not -- he was not
12 engaged in hands-on offending with the victims. That in no way
13 minimizes his conduct which is -- but he did not -- he did not
14 fondle, he did not rape, he did not sodomize, he did not
15 conduct any hands-on offending in this case. So he meets the
16 criteria of a non-hands-on offender.

17 Q. Did he even attempt to contact any of the victims in this
18 case, to your knowledge?

19 A. To my knowledge, no.

20 Q. You mentioned aggregate sentencing guidelines. We will
21 talk about the particular enhancements here.

22 A. Yes.

23 Q. What is his base offense, if you know?

24 A. His base offense level here is 32.

25 Q. And how is that increased specifically?

1 A. Well, with the enhancements, they, I believe, rocket up to
2 49.

3 Q. Okay.

4 A. So they almost -- they increase dramatically.

5 Q. Okay. And as you said, he's a first-time offender;
6 correct?

7 A. Yes.

8 Q. So, what, his criminal offense category is what?

9 A. One.

10 Q. Okay. And based on this 49 --

11 A. That is right. That is a life sentence according to the
12 guideline range.

13 Q. And is child pornography a life sentence charge under the
14 federal criminal statutes?

15 A. The statutory maximum is 30 years for a production in child
16 pornography.

17 Q. Okay. So based on the fact that when you take his offense
18 level, which is I, having no prior charges, arrests, or
19 anything of that sort, and then add all these enhancements,
20 you're basically telling the Court that the recommendation is a
21 life sentence for a non-life charge?

22 A. It just illustrates how unreasonable the guidelines are and
23 how each of these enhancements work to just absolutely stack
24 and aggravate the offense. And the problem with these
25 enhancements is that each of them, the ones we talked about,

1 have significant issues and challenges and have been debated in
2 court and have been tossed out in court. Other Courts have
3 accepted them, obviously. But there are -- there are issues
4 and challenges. And it's probably the greatest contributing
5 factor to the disparity in child pornography sentencing.

6 Q. Could you explain that to the Court regarding disparity?

7 A. Well, I mean, it's -- I believe in just regular child
8 pornography cases where you would see all of these
9 enhancements, Courts are varying at like a 62, 63 percent rate,
10 and it's -- it is -- the Sentencing Commission views that as a
11 problem, and they're trying to address it and it's been a
12 challenge.

13 Q. Has law kept up with the technology?

14 A. No.

15 Q. Explain that.

16 A. I mean, as I previously discussed, the 600-image
17 enhancement is Exhibit A. That is use of a computer.

18 Q. Now, we've seen these disparities in sentencing in cocaine
19 cases; correct? I'm just thinking an analogy.

20 A. The crack cocaine disparity, the Kimbrough case, and that
21 was -- that was a watershed kind of case that definitely gives
22 the Court discretion to get away from the guidelines.

23 Q. And now legislation has even changed regarding sentencing
24 between cocaine and crack cocaine?

25 A. Yes.

1 Q. Okay. Could you explain to the Court why you think the
2 guidelines should not even be used in this case?

3 A. Well, because there is such debate about them, that the
4 guidelines are unreliable. And there's case law that infers
5 that the guidelines are not presumed to be reasonable. And I
6 think that Mr. DeVito -- I think that issue has weight in this
7 case.

8 Q. Would 15 years suffice to deter somebody's individual
9 conduct, including based on your experience?

10 MR. HEALEY: Objection, Your Honor. That has to be
11 out of the scope of his expertise.

12 THE COURT: Sustained.

13 Q. Okay. Are you familiar with a case United States versus
14 Dorvee out of the Second Circuit, D-O-R-V-E-E?

15 A. Yes.

16 Q. Okay. And that's basically stating exactly what you said,
17 that these can lead to -- the guidelines can lead to
18 unreasonable sentences inconsistent with 3553; correct?

19 A. That's correct.

20 Q. Okay. Are you familiar with any of the other cases that
21 follow?

22 A. Yes. In particular, the cases that we noted in the
23 sentencing memorandum which I could refer to, but, yes, I am
24 familiar with them.

25 Q. Is there any other information that you want to provide

1 this Court with?

2 A. Yes, thank you.

3 Something that's, I think, important for the Court to
4 consider is that in this case or in all cases, the Court has
5 many tools available, and, for example, sexual offender
6 registration is now available. This was not available to the
7 Court when the guidelines were originally created. Lifetime
8 supervision is also now a tool that the Court has available;
9 also a factor that was not considered when the guidelines were
10 originally created.

11 I mentioned that Probation now has the tools and resources
12 available to work. Since 2012, they have national policy that
13 dictates how a sexual offender will be supervised in the
14 community. Special conditions now exist. Search conditions
15 now exist. Collateral contacts.

16 When Dr. Connor was speaking about polygraph and working
17 with Probation, and what he was describing was the containment
18 model which is a practice of sexual offender management. U.S.
19 Probation is mandated to use the containment model in the
20 supervision of its sexual offenders.

21 So Mr. DeVito will be subject to more supervision and more
22 conditions than any other type of federal offender, so he will
23 be closely watched.

24 Also available to the government is civil commitment. If
25 Mr. DeVito were to reoffend or even violate his probation in a

1 sexually dangerous way, he could be civilly committed. This
2 was a tool -- this, again, is a tool that was not available
3 when the guidelines were created.

4 So I shared this with you because it's a different -- it's
5 a different scenario for Mr. DeVito today than it would have
6 been several years ago when these policies and practices
7 weren't in place.

8 Q. Okay.

9 A. Ultimately, what these policies and practices do is they
10 make the communities safer and allow Mr. DeVito to eventually
11 reintegrate back into society.

12 Q. And as a probation officer, are you involved with assisting
13 in the treatment of defendants charged with child porn? Have
14 you had that experience?

15 A. Yeah. In working within the containment model, probation
16 officers work closely with the therapists, also the polygraph
17 examiner. It's not uncommon for probation officers to sit in
18 groups with mental health providers. It's not uncommon for
19 probation officers to develop questions for the polygraph exam
20 based on supervision, based on treatment.

21 Now, earlier -- let me clarify something. Earlier, there
22 was discussion of Mr. DeVito not being polygraphed prior to
23 sentencing. Polygraph tool is in the federal system in the
24 containment model is used as a tool for treatment. So that may
25 also be a reason why Mr. DeVito was not polygraphed at that

1 point.

2 Q. Okay.

3 MS. KOVOOR: One moment.

4 (Ms. Kovoar conferring with the defendant.)

5 Q. Could you go through the specific enhancements that you
6 find problematic? Just quickly.

7 A. Yes. The age enhancement, the 12 and under. The number of
8 images, 600-plus. The use of a computer. And there's one
9 more.

10 Q. The masochistic?

11 A. The sadomasochistic, yes.

12 Those are the four enhancements that really skyrocket his
13 level and that are redundant in a lot of ways or no longer --
14 no longer useful given the double nature of things.

15 Q. Okay. You had a little opportunity to discuss Mr. DeVito's
16 background with him; correct?

17 A. Yes.

18 Q. Could you describe to the Court what you learned? You also
19 spoke to his mother and wife?

20 A. Yes. In what regards?

21 Q. Just his general background.

22 A. Well, you know what, he was always a hardworking guy,
23 always worked, provided for his family, was -- loves his
24 mother. That was very evident. Loves his daughter. Was a
25 good -- by all reports, a good family man. Hardworking.

1 Q. Was there domestic violence in the home?

2 A. Yes. In speaking with his mother, he was exposed to
3 domestic violence at a very young age, domestic violence
4 between his mother and his father, a father who has since
5 passed, and Mr. DeVito saw a lot of that.

6 Q. I also want to mention first-time offender, okay. He, by
7 definition, cannot be considered a repeat offender; correct?

8 A. This is his first offense.

9 Q. Okay. Thank you.

10 THE COURT: Mr. Healey, do you wish to cross-examine?

11 MR. HEALEY: Yes, please.

12 THE COURT: You may proceed.

13 MR. HEALEY: Thank you.

14 CROSS-EXAMINATION

15 BY MR. HEALEY:

16 Q. How many presentence reports would you say you've reviewed
17 in your career?

18 A. Probably 40 to 50.

19 Q. How many did you work on when you were in the Probation
20 Office, forty or -- I mean, it has to be more than that, right,
21 if you spent ten years in Probation?

22 A. Yeah.

23 Q. How many did you work on when you were in the Probation
24 Office?

25 A. As a Pretrial officer, there was many more opportunities to

1 work versus a presentence. My assignment was not necessarily
2 in presentence. It was more as a program administrator for the
3 sex offender management program.

4 Q. So after the defendant was sentenced is when you were
5 typically involved, is that what you're saying?

6 A. No, usually prior.

7 Q. So you worked with Pretrial Services?

8 A. Pretrial Services, yes, and also U.S. Probation.

9 Q. And how long did you work with U.S. Probation?

10 A. Well, see, at the end -- Probation and Pretrial were
11 separate agencies at one time, and then they merged so there
12 was crossover.

13 Q. So you would do Probation work and you would also be doing
14 Pretrial work?

15 A. My work with Pretrial -- my work was primarily with
16 Pretrial.

17 Q. So I guess back -- you've only reviewed about 50 PS --
18 presentence reports in your career, is that what you're
19 testifying to?

20 A. That's correct.

21 Q. Of those 50, how many defendants had offense level 49s?

22 A. It was rare, very rare.

23 Q. Like any?

24 A. No, I cannot think of any. But, however, in my private
25 practice, I have had clients with that level.

1 Q. How many cases have you reviewed where the defendant
2 produced child pornography with 30 minors or over 30 minors?

3 A. I have one case in my private practice with those numbers.
4 Higher numbers.

5 Q. Now, you had talked about a lot of the criticism of the
6 guidelines in this case, but isn't the criticism of the
7 guidelines mainly to Section 2G2.2, the possession and
8 distribution offenses?

9 A. Well, they do cross over to the production side. For
10 example, I mean, in this case. I mean, the enhancements all
11 apply to -- or apply to Mr. DeVito at this point. So there is
12 a -- an issue of cross-reference.

13 Q. The criticism in this case is only coming from Mr. DeVito,
14 though, it's not coming from other Courts across the country;
15 isn't that right?

16 A. Well, based on the way that cases are being varied, I mean,
17 even in the production cases they're being varied. So I would
18 infer that they don't accept the guidelines and they are
19 varying as a result.

20 Q. Let's talk about some of the enhancements that you
21 complained about. The under-12 enhancement, you find that one
22 problematic, you said it applies in every case?

23 A. According to the Sentencing Commission, it applies in about
24 95, 94 percent of the cases.

25 Q. For Mr. DeVito, it didn't apply in all of his pseudo

1 counts, did it, actually?

2 A. I believe it did apply in his primary count.

3 Q. His primary, but the other counts it didn't apply because
4 the victims were over 12?

5 A. I'd have to take a look at it.

6 Q. In your experience in life, is someone under 12 a little
7 easier to manipulate than someone over 12?

8 A. I would agree with that, yes.

9 Q. Let's talk about the use of the computer enhancement. You
10 keep only referring to the use of the computer part, but the
11 actual two-level enhancement encompasses more conduct than
12 that, doesn't it?

13 A. It may.

14 Q. It actually encompasses producing sexually explicit
15 material for the purpose of transmitting such material live and
16 misrepresenting the participant's identity to persuade and
17 induce the minor. So there's a misrepresentation of identity
18 part, there's using a live transmission part, and that all
19 has -- that gets you the enhancement right there. It has
20 nothing to do with the computer. Would you agree with that?

21 A. That sounds accurate.

22 Q. You talked about the 600 images in this case, but that
23 doesn't actually apply to the production offense, does it?

24 A. I believe it's involved in this case, isn't it?

25 Q. It doesn't apply to any of his production counts?

1 A. But it's being applied to Mr. DeVito.

2 Q. In through grouping, it effectively drops off, doesn't it?

3 I mean, his guidelines don't even encompass his possession of

4 child pornography; isn't that correct? I mean, there's no

5 enhancement for his possession of that; isn't that right?

6 A. Well, they're still used to stack.

7 Q. Well, his production offenses stack him to the maximum;

8 isn't that right?

9 A. Well, his production is a 32, which the production base
10 offense level originally was a 25.

11 Q. Okay. Let's go to page 42 of the PSR. Do you have that in
12 front of you?

13 A. I'm sorry, page 40?

14 Q. 42, please.

15 A. Okay.

16 Q. Do you see Pseudo Count 2? Would you agree that that is
17 the possession of child pornography offense?

18 A. Adjusted offense level 31?

19 Q. Yes.

20 A. Well, Count 2 is the possession of child pornography
21 charge, so yes.

22 Q. And how many units are assigned to that count?

23 A. Zero.

24 Q. So how does that factor into his sentence?

25 A. It does not.

1 Q. Now, you had mentioned that a defendant could get 600
2 images of child pornography with a click of the mouse. You
3 would agree it takes a lot more work to solicit 30 minors to
4 create child pornography; right?

5 A. Yes.

6 Q. In this case it took DeVito months, weeks to do this?

7 A. Yes.

8 Q. You also indicated there's a problem with the
9 sadomasochistic enhancement. Could you go through the PSR and
10 let me know where that applies to Mr. DeVito's offense?

11 I can save you some time and give you the answer, if you'd
12 like.

13 A. Sure.

14 Q. It's not in there.

15 A. Okay.

16 Q. You indicated that Mr. DeVito's not a first-time offender;
17 is that right?

18 A. That he --

19 Q. Or he is a first-time offender rather?

20 A. Yes, he is.

21 Q. That means that this is the first time he's been convicted
22 of an offense?

23 A. That's correct.

24 Q. You would agree, though, there's a difference between
25 someone who commits an offense on one day of his life and

1 someone who commits an offense for over a year?

2 A. Yes.

3 Q. There's certainly a duration of criminality that's much
4 longer; right?

5 A. Yes.

6 Q. With Mr. DeVito's, while you still have page 42 in front of
7 you, his adjusted offense level at the end of page 42 or starts
8 actually at a level 42; is that right?

9 A. Yes.

10 Q. And then he jumps up another five levels from there; is
11 that correct?

12 A. That's correct.

13 Q. And that's really attributed to the number of units he has
14 which is the number of victims --

15 A. Correct.

16 Q. -- in this case?

17 A. Correct.

18 Q. So that's one of the largest jumps he makes is the number
19 of victims; right?

20 A. That's right. And I believe Mr. -- and I'm not sure if the
21 issue has been resolved, but I believe Mr. DeVito objected to
22 the use of pseudo counts.

23 Q. We'll leave that one for the Judge.

24 You had indicated that the Court shouldn't use the
25 guidelines in this case. I think I got what you were saying.

1 What you're saying is, you know, the guidelines don't come from
2 the same base of empirical evidence that perhaps the other
3 guidelines do?

4 A. That's correct. In my opinion, the guidelines push
5 Mr. DeVito's potential sentence beyond the scope of fair and
6 just punishment that's required.

7 Q. So you're actually then getting into the 3553 factors; is
8 that right?

9 A. That's correct. Yes.

10 Q. Which you would agree includes, I mean, this isn't just
11 treatment, a sentencing hearing for a defendant; right? There
12 is punishment as a portion of this?

13 A. Of course.

14 Q. Deterrence is a portion of this?

15 A. Absolutely.

16 Q. Promoting respect for the law is part of this?

17 A. Yes. And that's why a 15-year sentence is here.

18 Q. That's why Congress put the minimum at 15?

19 A. That's right.

20 Q. How many victims of child pornography have you spoken with?

21 A. A handful. Through training and education.

22 Q. So these are ones that were --

23 A. Like at a conference.

24 Q. Seemingly participating in the conference?

25 A. That's right.

1 Q. Did you speak to any of the victims in this case?

2 A. No.

3 MR. HEALEY: I have no further questions, Your Honor.
4 Thank you.

5 THE COURT: Thank you, Mr. Healey.

6 Do you have any redirect examination, Ms. Kovoor?

7 MS. KOVOOR: Just briefly.

8 REDIRECT EXAMINATION

9 BY MS. KOVOOR:

10 Q. The charged conduct here which Mr. DeVito pled to
11 knowingly, voluntarily was conduct on the internet for a period
12 of five days with Victim A; correct?

13 A. Yes.

14 Q. Okay. You looked through all of the chats that we provided
15 you; correct?

16 A. Yes.

17 Q. And it was a binder full?

18 A. Yes.

19 Q. Okay. Were you able to decipher the ages of the
20 individuals in the pseudo counts?

21 A. No.

22 Q. Were you provided any specific information regarding the
23 pseudo counts victims?

24 A. No.

25 Q. So all you know -- we know is that Mr. DeVito during the

1 plea agreement stated that he agreed to similar acts with 25 or
2 so other victims?

3 A. That is my understanding, yes.

4 Q. There was no information about where these acts took place?

5 A. No.

6 Q. Who they were?

7 A. No.

8 Q. How old they were?

9 A. No.

10 Q. And regarding the guidelines calculations, you did mention
11 to Mr. Healey that use of a minor was a plus two?

12 A. I don't think we -- you mean use of a computer, I believe,
13 is what we were discussing.

14 Q. Okay. The use of the computer was specified in the
15 presentence report; correct?

16 A. Yes.

17 Q. Okay. And that was his work phone and his personal phone?

18 A. Yes.

19 Q. Okay.

20 (Ms. Kovoov conferring with the defendant.)

21 Q. And, again, you're basically stating that the guidelines in
22 child pornography cases have been criticized by the U.S.
23 Sentencing Commission, by Federal Courts, by the Bureau of
24 Prisons; correct?

25 A. I have not heard anything about the Bureau of Prisons.

1 Q. Okay.

2 A. But the first two, yes.

3 Q. And there have been research studies that show that they
4 are -- they treat individuals unfairly?

5 A. Yes.

6 MS. KOVOOR: Thank you.

7 THE COURT: Any recross, Mr. Healey?

8 MR. HEALEY: No, Your Honor. Thank you.

9 THE COURT: Okay. Mr. Pimentel, the Court appreciates
10 your testifying, and you are excused.

11 THE WITNESS: Thank you, Your Honor.

12 MS. KOVOOR: Your Honor, I have one more witness. It
13 would be probably a five-minute witness, if you want to do that
14 now or after lunch.

15 THE COURT: I wanted to take a break. We've been
16 sitting for an hour-and-a-half. We're going to take a
17 15-minute break.

18 MS. KOVOOR: Okay. Thank you.

19 (Recess in proceedings from 11:33 a.m. to 11:51 a.m.)

20 AFTER RECESS

21 COURTROOM DEPUTY: Counsel and defendant please
22 approach the podiums.

23 THE COURT: Ms. Kovoar, what is the nature of the
24 testimony of your other witness, is it mitigation?

25 MS. KOVOOR: Yes, Your Honor.

1 THE COURT: I'd prefer to hear it later, then.

2 MS. KOVOOR: Oh, okay. All right. It just goes -- I
3 was just going to be quickly questioning her as to background,
4 how he was growing up. That's all.

5 THE COURT: Does she need to be excused after that?

6 MS. KOVOOR: I think she's going to stay here the
7 whole day.

8 THE COURT: Well, if she's going to stay, then I'd
9 prefer it when I hear mitigation.

10 MS. KOVOOR: Sure.

11 THE COURT: Stay up here, please.

12 On a former day, the defendant pleaded guilty to
13 production of child pornography. At that time, the matter was
14 referred to the United States Probation Department for a
15 presentence investigation and report. The Court has received
16 the presentence report prepared December 17th, 2018.

17 The Court has also received and reviewed the following
18 documents relevant to sentencing: The psychosexual evaluation
19 prepared on June the 6th, 2017 by clinical psychologist Ed
20 Connor and filed under seal with the Court on November 27th,
21 2017, that's document 40; the defendant's sentencing memorandum
22 filed on April 24th, 2019, document 81; and the amended
23 sentencing memorandum filed on April 26th, 2019, which is
24 document 83; the government's sentencing memorandum filed on
25 May the 3rd, 2019, which is document 84; a pro se sentencing

1 memorandum with exhibits and letters received in my chambers
2 e-mail on April 25th, 2019 and filed on May the 9th, 2019 as
3 document 86. Then the Court has recently received on May the
4 20th, 2019 a post-addendum to the presentence report from the
5 Probation Department; three victim impact statements received
6 to date of May 20th, 2019 that -- they were received on May
7 20th, 2019; an e-mail dated May 17th, 2019 from Cheryl DeVito,
8 and that was typed; and then a handwritten letter dated May the
9 10th, 2019 from defendant, Richard DeVito, which seemed to be
10 virtually identical to the e-mail that was sent from Cheryl
11 DeVito.

12 Let me ask counsel, have you received a copy of all
13 these documents?

14 Mr. Healey?

15 MR. HEALEY: Yes, Your Honor. If I may apologize, did
16 you mention the disk that we showed you in chambers?

17 THE COURT: No, I did not.

18 MR. HEALEY: Okay.

19 THE COURT: Okay. How do I describe that? The Court
20 has viewed --

21 MR. HEALEY: I can put an exhibit sticker on it and
22 label it Exhibit 1.

23 THE COURT: Okay. The Court has viewed what is
24 Exhibit 1, which how would you describe that?

25 MR. HEALEY: I can give you the exact description,

1 Your Honor. It is a disk containing the sexually explicit
2 images of five of the minor victims.

3 THE COURT: Okay.

4 MR. HEALEY: Of course, my computer locked. I can
5 give you the names of the victims.

6 THE COURT: I don't think that's necessary.

7 MR. HEALEY: Okay.

8 THE COURT: All right. So you've received copies of
9 everything, Mr. Healey?

10 MR. HEALEY: Yes, Your Honor.

11 THE COURT: All right. Ms. Kovoov, have you received
12 copies of everything we've mentioned?

13 MS. KOVOOR: Yes, obviously not the pictures or photos
14 that you saw in chambers, but I know of them and I have
15 descriptions of them.

16 MR. HEALEY: We have discussed it with her what we had
17 shown you.

18 THE COURT: Okay. And, Mr. DeVito, have you received
19 copies of all the documents I described?

20 THE DEFENDANT: Not the last May 20th.

21 MS. KOVOOR: The victim impact statements I have in my
22 possession, Your Honor. I have not shared it with him as of
23 right now.

24 THE COURT: Okay. Well, I don't think it's critical
25 that he review them, but at the -- maybe at the lunch break he

1 can review those.

2 Other than that, you've seen everything else,
3 Mr. DeVito?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. And have you had an
6 opportunity to discuss all the documents with your attorney,
7 Ms. Kovoov?

8 THE DEFENDANT: Briefly yesterday.

9 THE COURT: All right. Then let me first talk about
10 the factual findings for sentencing.

11 Defense counsel has put forth objections to the
12 presentence report. I'll ask counsel to address these
13 objections momentarily. First, however, I'd like to address
14 the other factual findings for sentencing.

15 And before the Court accepts the presentence report as
16 part of the sentencing facts in this case and proceeds to
17 address any additional sentencing facts the parties wish to
18 present, I want to put on the record the Court's method for
19 determining a sentence.

20 This Court considers the factors discussed in the
21 advisory sentencing guidelines along with other factors, such
22 as those contained in 18 U.S.C. Section 3553(a), in arriving at
23 a sentence.

24 Let me ask counsel, are any of the facts other than
25 those in the objections that are reported in the presentence

1 report disputed by the government or the defendant?

2 Mr. Healey?

3 MR. HEALEY: Not from the government, Your Honor.

4 THE COURT: Ms. Kovoov?

5 (Ms. Kovoov conferring with the defendant.)

6 MS. KOVOOR: No, Your Honor.

7 THE COURT: Ms. Kovoov, do you have any additional
8 sentencing facts?

9 MS. KOVOOR: Besides Miss DeVito's testimony, no, Your
10 Honor.

11 THE COURT: All right. Mr. Healey, any additional
12 sentencing facts?

13 MR. HEALEY: No, Your Honor. I do have a CD that has
14 the full 900 pages of chats or the accounts that I can make
15 available, but I would not introduce any new evidence. Just
16 what's in my sentencing memo. I just wanted to make sure that
17 that was on the record if anybody had any questions about the
18 authenticity of it. It doesn't sound like there is, but I have
19 those available if the Court would want to review them.

20 THE COURT: And those were available to defense
21 counsel?

22 MR. HEALEY: Yes. They were provided in discovery.

23 THE COURT: All right. Then there being no objections
24 other than those previously mentioned to the factual statements
25 contained in the presentence report, the Court adopts those

1 statements as its finding of fact.

2 The defendant has entered a valid plea to Count 1 of
3 the indictment. Accordingly, the defendant is adjudged guilty
4 in Case Number 1:16-CR-115 of production of child pornography.

5 Pursuant to 18 United States Code Section 3553(a) and
6 (c), the Court makes the following findings of relevant facts
7 significant to the imposition of sentence.

8 The defendant is guilty of violating 18 United States
9 Code Section 2251(a) and (e) which is a Class B felony and
10 subjects the defendant to a mandatory minimum of 15 years and a
11 maximum of 30 years imprisonment, a fine of up to \$250,000, a
12 period of supervised release of up to life, a \$100 special
13 assessment, and a \$5,000 special assessment for the Justice for
14 Victims of Trafficking Act of 2015, and restitution and
15 forfeiture.

16 Let me next deal with the issue of objections. Are
17 there any objections to the presentence report that have not
18 been previously raised?

19 MS. KOVOOR: They've all -- they have been previously
20 raised, Your Honor, but I can summarize them for you.

21 THE COURT: Well, I'm going to do that and see if you
22 have anything additional to say.

23 Anything, Mr. Healey?

24 MR. HEALEY: No, Your Honor.

25 THE COURT: All right. Then the Court will now

1 address the defendant's objections. And what I'll do is I'll
2 tell you what the objection is, I'll ask you if you have
3 anything additional to say on it, and then the Court will rule
4 on it.

5 Objections numbers one and two and bullet point I from
6 objection number six. The defendant objects to the probation
7 officer's determination that the total offense level is 43, the
8 inclusion of the run-of-the-mill enhancements which they
9 alleged constituted double counting, and the creation of pseudo
10 counts. Bullet point I states there are numerous improprieties
11 in the various pseudo counts and that the inclusion of the
12 pseudo counts is not justified. Therefore, defense counsel
13 noted there is no need to pinpoint the discrepancies. As such,
14 the defendant believes the removal of all of the pseudo counts
15 eliminates all of the factual mistakes alleged by the
16 defendant.

17 In objecting to the pseudo counts, the defendant also
18 objected to the five-level enhancement in accordance with
19 Sentencing Guideline Section 3D1.4 which is the grouping to
20 determine the combined offense level. Defense counsel cites
21 the run-of-the-mill enhancements as the following: Use of a
22 computer, number of images, and the age of the children
23 involved. Mr. DeVito indicated his offense level should be 32
24 in the absence of the run-of-the-mill enhancements and pseudo
25 counts. After a three-level reduction for acceptance of

1 responsibility, Mr. DeVito states his total offense level
2 should be 29. An offense level of 29 combined with a criminal
3 history category of I results in a guideline imprisonment range
4 of 87 to 108 months.

5 Is there anything, Ms. Kovoor, you want to add to the
6 summary I've given of objection number one?

7 (Ms. Kovoor conferring with the defendant.)

8 MS. KOVOOR: No, Your Honor.

9 THE COURT: All right. Anything you want to say in
10 regard to the objection, Mr. Healey?

11 MR. HEALEY: No, Your Honor.

12 THE COURT: All right. Then the Court's response
13 through the probation officer is the defendant via the
14 statement of facts acknowledged that he knowingly employed,
15 used, persuaded, induced, or enticed Minor Victim A, an
16 eight-year-old female, to engage in sexually explicit conduct
17 for the purpose of producing a visual depiction of the conduct.
18 The defendant obtained the visual depictions of Minor Victim A
19 by having them transmitted to him via the internet. In
20 addition, Mr. DeVito also acknowledged in the statement of
21 facts that he knowingly induced and persuaded at least 25 other
22 minors to send him similar videos and photographs over the
23 internet that depicted their genitalia or otherwise depicted
24 them engaged in sexually explicit conduct. Lastly, Mr. DeVito
25 admitted via the statement of facts that he knowingly possessed

1 thousands of images and video files that depicted child
2 pornography and that the files depicted prepubescent children
3 under the age of 12 engaged in sexual acts with adults. The
4 statement of facts was signed by the defendant and defense
5 counsel and is attached as part of the plea agreement in this
6 matter. Therefore, the additional acts on the part of the
7 defendant is relevant conduct to the offense of conviction.

8 Therefore, in accordance with Sentencing Guidelines
9 Section 1B1.2(c), because the plea agreement specifically
10 established the commission of the additional offenses of
11 production of child pornography, which are the multiple pseudo
12 counts, and possession of child pornography, which is Pseudo
13 Count 2, it shall be treated as if Mr. DeVito had been
14 convicted of the additional offenses. As such, the Court
15 believes the inclusion of the pseudo counts is appropriate.

16 With respect to the guideline calculation and creation
17 of the additional pseudo counts under Sentencing Guidelines
18 Section 2G2.1, the Court provides the following information:
19 Pursuant to Sentencing Guideline 2G2.1(d)(1), if the offense
20 involved the exploitation of more than one minor, Chapter
21 Three, Part D, which is multiple counts, shall be applied as if
22 the exploitation of each minor had been contained in a separate
23 count of conviction. Mr. DeVito admitted to the fact that he
24 exploited at least 25 additional minors in the statement of
25 facts. The creation of the pseudo counts as contained in the

1 presentence investigation report are thus not only supported by
2 the tenets of Sentencing Guidelines Section 1B1.2(c) because
3 the plea agreement specifically established the commission of
4 the additional offenses but also by the provisions of
5 Sentencing Guidelines Section 2G2.1(d)(1). Therefore, the
6 probation officer contends that Minor Victim A should represent
7 Count 1 in the sentencing guideline calculation, and the
8 remaining victims should be treated as pseudo counts to Count 1
9 with respect to the charge of production of child pornography.

10 Pseudo Count 2 relates to the defendant's separate
11 cache of child pornography. As noted above, Mr. DeVito
12 admitted to possessing child pornography in the statement of
13 facts and, thus, in accordance with Sentencing Guidelines
14 Section 1B1.2(c), the probation officer believes Pseudo Count 2
15 is also correctly presented in the presentence investigation
16 and report.

17 In relation to the objection to the run-of-the-mill
18 enhancements and their resulting double counting, the probation
19 officer provides the following information. Sentencing
20 Guidelines Section 2G2.1 provides several specific offense
21 characteristics that could be applicable in cases involving the
22 production of child pornography. In this case, the defendant
23 received an increase to his offense level due to several of
24 these specific offense characteristics. Defense counsel
25 included the use of a computer, the number of images possessed

1 by the defendant, and the age of the children involved in the
2 offense as run-of-the-mill enhancements that result in double
3 counting. The defendant does not argue that the enhancements
4 are not accurate but rather they should not apply because they
5 are run-of-the-mill. The probation officer is aware of the
6 recent criticism related to the aforementioned enhancements as
7 they apply to non-production offenders. However, in this case,
8 Mr. DeVito produced child pornography. Therefore, the
9 enhancements are warranted. It should be noted that Sentencing
10 Guidelines Section 2G2.1 does not contain an enhancement for
11 number of images.

12 In response to the assertion that the enhancements
13 result in double counting, the probation officer contends that
14 the enhancements correlate to distinct aspects of Mr. DeVito's
15 conduct and thus do not result in double counting. For
16 example, the application for use of a computer under Sentencing
17 Guidelines Section 2G2.1, which is production of child
18 pornography, was applied for Minor Victim A and each of the
19 additional victims in the pseudo counts who interacted with
20 Mr. DeVito via the computer. In each instance that the
21 defendant contacted a separate victim, it represented a
22 separate and distinct harm. With respect to Pseudo Count 2
23 under Sentencing Guidelines Section 2G2.2, which is possession
24 of child pornography, the enhancement was utilized because
25 Mr. DeVito used his computer to download, view, and possess

1 additional images of child pornography that did not involve the
2 minor victims represented under the application of Sentencing
3 Guidelines Section 2G2.1. Therefore, the use of the computer
4 enhancement under Sentencing Guidelines Section 2G2.2
5 represented a separate aspect of Mr. DeVito's criminal conduct
6 and does not result in double counting.

7 An enhancement for number of images is applicable with
8 respect to Pseudo Count 2 in accordance with Sentencing
9 Guideline Section 2G2.2(b)(7)(D). However, this does not
10 represent double counting, as this enhancement is not
11 applicable to the other guideline calculations. It should be
12 noted that in the event the Court were to remove the
13 run-of-the-mill enhancements for Pseudo Count 2, which is the
14 possession of child pornography, in light of the criticisms
15 pointed out by the defendant, it would not change the total
16 offense level as calculated by the probation officer.

17 All right. I'm going to go on now to objection number
18 three and bullet point M, as in Mary, from objection number
19 six. The defendant objects to the tone of the presentence
20 investigation report and claims the probation officer relied
21 too much on the sentencing guidelines to the exclusion of other
22 relevant and important sentencing factors. Mr. DeVito asserts
23 that the probation officer treated the sentencing guidelines as
24 mandatory. The defendant, through counsel, stated the
25 probation officer did not give due consideration and weight to

1 the factors outlined in 18 U.S.C. Section 3553(a).

2 Specifically, Mr. DeVito cites the sexual abuse he suffered as
3 a child, his addiction to pornography, and the fact that he was
4 exposed to pornography at a very young age. He contends proper
5 consideration of the aforementioned mitigating factors dictate
6 a term of incarceration that is substantially lower than the
7 recommendation contained in the presentence investigation
8 report.

9 Additionally, the defendant believes paragraph 417 in
10 its entirety should be stricken from the presentence
11 investigation report. This position is described in bullet
12 point M under objection number six in defense counsel's letter.
13 Bullet point M refers to paragraph 416 of the initial
14 presentence investigation report, but it should be noted that
15 this paragraph is now 417 in the final presentence
16 investigation report.

17 Ms. Kovoov, do you want to comment on this objection?

18 MS. KOVOOR: No, Your Honor.

19 THE COURT: Mr. Healey, anything with regard to this
20 objection?

21 MR. HEALEY: No, Your Honor.

22 THE COURT: All right. Then the probation officer's
23 response is that 18 U.S.C. Section 3553(a) states the Court
24 should consider the history and characteristics of the
25 defendant, the nature and circumstances of the offense, the

1 need to protect the public from future crime on the part of the
2 defendant, general deterrence, and the need to provide a
3 punishment that is sufficient but not greater than necessary to
4 achieve the goals of sentencing.

5 In paragraphs 416 and 417 of the final presentence
6 investigation report, the probation officer identified various
7 mitigating factors included in 18 U.S.C. Section 3553(a). The
8 probation officer cited the following mitigating factors for
9 the Court to consider: The defendant was previously dependent
10 upon alcohol. He suffers from anxiety and depression. He is
11 addicted to child pornography and potentially video games. His
12 parents had a volatile relationship. He experienced a solitary
13 childhood. He was inappropriately touched by his half-brother
14 on one occasion and forced to perform oral sex on his
15 half-brother. And he was exposed to adult and child
16 pornography at an early age.

17 However, in paragraph 418 of the presentence
18 investigation report, the probation officer also outlined
19 aggravating factors involved in this matter. Of concern to the
20 probation officer is the fact that the offense behavior in this
21 case is serious and far reaching. As noticed -- I'm sorry, as
22 noted in the presentence investigation report, the case
23 involved 30 minor females who were identified. However, case
24 agents also discovered an additional ten victims who have yet
25 to be positively identified. In the event the case agents were

1 able to positively identify the additional ten minors, they
2 would have represented an additional ten pseudo counts under
3 the guideline calculations.

4 In addition, the probation officer identified the fact
5 that the child pornography possessed by the defendant
6 represents a separate victim pool that was affected by
7 Mr. DeVito's conduct. The defendant's illegal behavior reached
8 minors throughout the United States and Australia.

9 Lastly, the probation officer also identified the fact
10 that the nature of the offense is serious and the effects of
11 such events on the victims are likely serious and long lasting.

12 It should be noted Application Note 8 under Sentencing
13 Guideline Section 2G2.1 states an upward departure may be
14 warranted if the offense involved more than ten minors.
15 However, the probation officer did not recommend an upward
16 departure.

17 Pursuant to Federal Rule of Criminal Procedure 32, the
18 probation officer is required to identify any factors relevant
19 to the appropriate kind of sentence, the appropriate sentence
20 within the applicable sentencing range, and any basis for
21 departing from the applicable sentencing range. Based upon the
22 aforementioned information, the probation officer asserts both
23 the available mitigating and aggravating factors in this case
24 have been presented for the Court's consideration. And the
25 Court overrules that objection and that bullet point. And that

1 was objection number three and bullet point M from objection
2 number six.

3 Next are the objections to numbers four and five.
4 Objection numbers four and five relate to the recommended
5 sentence of imprisonment and the term of supervised release
6 contained in the presentence investigation report. The
7 defendant contends the probation officer's recommended term of
8 imprisonment does not take into account parsimony, violates the
9 mandate that the defendant's sentence conform to the type of
10 sentences given to other defendants who have committed similar
11 crimes, and is illegally disparate. Mr. DeVito asserts he
12 should only be exposed to a maximum term of imprisonment of 108
13 months and that lifetime supervised release is inconsistent
14 with the conduct to which the defendant admitted in Count 1 of
15 the indictment.

16 Do you want to say anything with regard to those
17 objections, Ms. Kovoov?

18 MS. KOVOOR: Your Honor, just that the rule of lenity
19 should be that any vagueness or lack of information should go
20 towards the defendant, and here, it seems like it's
21 continuously going for the government. When I was here, I
22 heard Mr. DeVito state that he accepted responsibility and he
23 agreed to similar conduct with 25 other victims. Now I'm
24 hearing 30, excess of 30, another ten. And I have concerns
25 about we have no information regarding the pseudo counts,

1 regarding the duration of those offenses, whether it was with
2 the same five-day period as charged in the indictment for
3 Victim A, we don't know where this happened, or the ages, and I
4 just have always felt that tenet of the law is if there's any
5 confusion, vagueness, anything, it goes to the benefit of the
6 defendant, not the government.

7 THE COURT: Mr. Healey, do you wish to respond?

8 MS. KOVOOR: There is also, Your Honor, a case U.S.
9 versus Pharis, P-H-A-R-R-U-S, I believe, that we've cited in
10 the memorandum.

11 THE COURT: How do you spell that?

12 MS. KOVOOR: P-H-A-R-R-U-S.

13 THE COURT: Thank you.

14 MS. KOVOOR: Thank you.

15 THE COURT: Mr. Healey?

16 MR. HEALEY: Your Honor, I think there's kind of two
17 separate issues in there. The one is how the Court goes about
18 deciding what the sentence is, and the other is what conduct
19 should he be held accountable for.

20 THE COURT: Will you pull the microphone closer to
21 you?

22 MR. HEALEY: The other is what conduct should he be
23 held accountable for. And what Miss Kovoer said, I think she's
24 right to the extent that he admitted to 25 additional victims
25 in the factual basis. It should stop with the 25. We should

1 not -- you know, I realized I referenced 33 in my sentencing
2 memo and I should not. It should just be the 25.

3 But in regards to, you know, the parsimony of how the
4 Court should go about determining the sentence, I think that
5 I'm not sure it -- given the conduct in this case, whether it's
6 25 or 33, I don't really think changes anything. But she is
7 correct to the extent that what he acknowledged in the plea was
8 25, and that's the number the United States should stick to in
9 this case. So --

10 THE COURT: All right. Thank you.

11 The probation officer's response was as noted, the
12 probation officer explored both the mitigating and aggravating
13 factors associated with the defendant and the offense behavior
14 he committed. Taking all of the available information into
15 account, the probation officer determined the aggravating
16 factors outweighed the mitigating factors when recommending a
17 term of imprisonment in this case. As such, the probation
18 officer believes a sentence of 360 months in the Bureau of
19 Prisons followed by a lifetime of supervised release is
20 warranted due to the serious nature of the offense and the
21 number of victims affected by the defendant. The recommended
22 term of imprisonment and term of supervised release are not
23 binding on the Court.

24 And I want to emphasize that, that what the probation
25 officer recommended is just that, a recommendation to the

1 Court; that the Court makes its own determination of the
2 sentence.

3 So the objections to numbers four and five are
4 overruled.

5 Objection number six. Objection number six as
6 contained in the objection letter submitted by defense counsel
7 contained subparts that are outlined as bullet points A through
8 M. As noted above, bullet points A through D and J through L
9 have been resolved. The unresolved portions of objection
10 number six are outlined below. However, it should be noted
11 that bullet point I was discussed with objections one and two
12 as they relate to the same topic, and bullet point M -- bullet
13 point M which was discussed with objection number three.

14 Bullet point E corresponds to paragraph 18 of the
15 presentence investigation report. The defendant contends the
16 statement of facts does not include anything about
17 bestiality -- bestiality, bondage, or the types of sexual
18 penetration described in paragraph 18. It further states the
19 plea agreement does not open the door to the consideration of
20 pseudo counts.

21 Bullet point F corresponds to paragraph 19 of the
22 presentence investigation report. Mr. DeVito objects to the
23 word "instructed" as used by the probation officer and asserts
24 he never instructed a minor to engage in any specific conduct.
25 The defendant also addressed the fact that the probation

1 officer included the word "bestiality" in paragraph 19 and
2 believes the word "bestiality" should be stricken from
3 paragraph 19 and anywhere else it is contained in the
4 presentence investigation report.

5 Bullet point G corresponds to paragraph 22 of the
6 presentence investigation report. The defendant noted the
7 statement of facts does not speak to any other minor and that
8 all references to Minor Victim B should be removed from the
9 presentence investigation report. Mr. DeVito also states the
10 word "instructed" should be removed from paragraph 22.

11 Bullet point H refers to paragraph 23 and the last
12 sentence of the paragraph that refers to a dog. Mr. DeVito
13 asserts this information is totally contrary to the statement
14 of facts which by interlineation eliminates any involvement of
15 animals in the offense conduct.

16 Ms. Kovoor, any additional comments or objections
17 to --

18 MS. KOVOOR: Just to comment, Your Honor. You've had
19 a chance to review some of the videos and the chats that were
20 included in the government's memorandum. You would see that it
21 was disturbingly brought up by the eight-year-old that her dog
22 licks her, do you want to see, and it was brought out by the
23 eight-year-old. That's all we're saying. We're not contesting
24 anything more than that we wanted it stricken from the
25 statement of facts regarding bestiality because it was -- there

1 was no instruction by the defendant regarding that. It was
2 brought out by the eight-year-old during a Facetime
3 conversation.

4 THE COURT: Thank you.

5 Mr. Healey, do you wish to respond?

6 MR. HEALEY: Your Honor, I would just note that, yes,
7 in regards to the bestiality, that was not part of his plea,
8 but we would submit that, you know, that's our ability to
9 submit the entire facts or the evidence against Mr. DeVito to
10 the Court in this case. So, you know, it did not calculate in
11 his guidelines, but it doesn't mean the Court's not permitted
12 to consider it for sentencing.

13 THE COURT: All right. The Court will overrule
14 objection number six. Let me tell you why.

15 Paragraph 18, bullet point E, describes the child
16 pornography located on the defendant's iPhone and laptop
17 computer. The probation officer met with the Assistant U.S.
18 Attorney and the FBI agent and reviewed the material possessed
19 by Mr. DeVito. The information contained in paragraph 18
20 reflects the material and -- the material the probation officer
21 verified while in the presence of the FBI agent and the
22 Assistant United States Attorney. Mr. DeVito acknowledged in
23 the statement of facts that he knowingly possessed thousands of
24 images and video files that depicted child pornography. He
25 also acknowledged the files depicted prepubescent children

1 under the age of 12 engaged in sexual acts with adults. The
2 defendant's possession of the additional cache of child
3 pornography encompasses the basis for Count 2 of the
4 indictment. Therefore, in accordance with Sentencing
5 Guidelines Section 1B1.2(c), because the plea agreement
6 specifically establishes the commission of this offense, it
7 shall be treated as if Mr. DeVito had been convicted of the
8 additional count charging the offense of possession of child
9 pornography which represents Pseudo Count 2 in the sentencing
10 guidelines calculation. Additionally, the probation officer is
11 not bound by the statement of facts and any or agreements -- or
12 any agreements between the parties. Given that Mr. DeVito
13 admitted to this conduct in the plea agreement via the
14 statement of facts, the probation officer asserts it is
15 properly included in the presentence investigation report.

16 Paragraph 19, which is bullet point F, references the
17 probation officer's introductory summary of the offense
18 behavior related to Count 1 of the indictment. The information
19 as presented in paragraph 19 was obtained from the FBI agent
20 and via the probation officer viewing the relevant discovery
21 materials related to the case. Therefore, the probation
22 officer asserts the information is accurately presented in the
23 presentence investigation report. And the Court has also
24 reviewed that evidence.

25 Paragraph 22, which is bullet point G, corresponds to

1 the information the probation officer included regarding Minor
2 Victim B who was the younger cousin of Minor Victim A. The
3 defendant asserted that Minor Victim B should be removed as the
4 statement of facts does not speak to any other minor. However,
5 in the statement of facts, Mr. DeVito admits that he knowingly
6 induced and persuaded at least 25 other minors to send him
7 similar videos and photographs over the internet that depicted
8 their genitalia or otherwise depicted them engaging in sexually
9 explicit conduct. Minor Victim B is one of the minors
10 encompassed by the aforementioned quote from the statement of
11 facts. Therefore, the probation officer believes this
12 information is correctly included in the report.

13 Paragraph 23, which is bullet point H, relates to
14 paragraph 23 of the presentence investigation report.
15 Specifically, the defendant objects to the inclusion of the
16 information that Minor Victim A sent Mr. DeVito a video of her
17 small doing licking her vagina. The probation officer
18 recognizes the parties struck the information related to the
19 dog from the statement of facts. However, in accordance with
20 the tenets of relevant conduct under Sentencing Guideline
21 Section 1B1.3, all acts and commissions -- I'm sorry, all acts
22 and omissions committed, aided, abetted, counseled, commanded,
23 induced, procured, or willfully caused by the defendant shall
24 be considered when determining the offense conduct and
25 subsequent sentencing guideline range. The probation officer

1 and the Court, while in the presence of the FBI agent and the
2 Assistant U.S. Attorney, viewed the video of Minor Victim A
3 allowing her dog to repeatedly lick her genitals. This video
4 was transmitted to Mr. DeVito, and he commented on the behavior
5 to Minor Victim A. The video lasted several minutes. The
6 probation officer contends the information is appropriately
7 contained in the report.

8 And as I said, that objection is also overruled.

9 I think that's the end of the objections. Is that
10 correct, Ms. Kovoor?

11 MS. KOVOOR: Yes, Your Honor.

12 THE COURT: Mr. Healey, any more objections?

13 MR. HEALEY: Yes -- no, Your Honor.

14 THE COURT: Okay. Then let me go over what the
15 suggested federal sentencing guidelines are.

16 Richard Lee DeVito pled guilty to one count of
17 production of child pornography, a Class B felony, in violation
18 of Title 18 United States Code Section 2251(a) and (e). In
19 accordance with the provisions of Title 18 United States Code
20 Section 3553(c), the Court places on the record the following
21 statement of reasons.

22 The applicable Sentencing Guidelines Manual is the
23 2018 edition.

24 The defendant entered a plea of guilty to one count of
25 production of child pornography. However, pursuant to

1 Sentencing Guidelines Section 1B1.2(c), the plea agreement
2 contains a stipulation that specifically establishes the
3 commission of additional offenses. Therefore, they shall be
4 treated as if the defendant had been convicted of additional
5 counts charging those offenses. Specifically, the statement of
6 facts established the defendant produced child pornography
7 involving at least 25 additional minor victims and established
8 that Mr. DeVito possessed child pornography of additional
9 prepubescent minors not associated with his criminal conduct
10 related to the production of child pornography.

11 Pursuant to Sentencing Guidelines Section 2G2.1(d)(1),
12 if the offense involved the exploitation of more than one
13 minor, Chapter Three, Part D, which is multiple counts, shall
14 be applied as if the exploitation of each minor had been
15 contained in a separate count of conviction. Therefore, the
16 offenses against each of these victims in the production of
17 child pornography and the additional conduct related to the
18 possession of child pornography acknowledged in the plea
19 agreement will be the subject of pseudo counts and calculated
20 separately.

21 Pursuant to Sentencing Guidelines Section 3D1.1(a)(1),
22 when a defendant has been convicted of more than one count, the
23 Court shall group the counts resulting in conviction into
24 distinct groups of closely related counts by applying the rules
25 of Sentencing Guidelines Section 3D1.2. In this case, the

1 defendant produced and possessed child pornography of multiple
2 different victims which represents separate instances of harm
3 to each victim as detailed in Application Note 4 under
4 Sentencing Guidelines Section 3D1.2. As such, the counts are
5 not groupable under Sentencing Guidelines Section 3D1.2(b).

6 With respect to Count 1, which was Minor Victim A, the
7 base offense level for a violation of 18 U.S.C. Section 2251(a)
8 is found at Sentencing Guidelines Section 2G2.1. Pursuant to
9 Sentencing Guideline 2G2.1(a), the base offense level is 32.

10 Four levels are added in accordance with Sentencing
11 Guideline Section 2G2.1(b)(1)(A) because the victim was less
12 than 12 years of age.

13 Pursuant to Sentencing Guidelines Section
14 2G2.1(b)(2)(A), two levels are added because the offense
15 involved the commission of a sex act.

16 The defendant knowingly misrepresented his identity to
17 the victim for the purpose of producing sexually explicit
18 material. Therefore, two levels are added in accordance with
19 Sentencing Guidelines Section 2G2.1(b)(6).

20 And pursuant to Sentencing Guidelines Section 3B1.4,
21 two levels are added because the defendant used a minor to
22 commit the offense.

23 That makes the adjusted offense level for Count 1 42.

24 In an effort to consolidate the application of the
25 guidelines with respect to the pseudo counts, the probation

1 officer presented the pseudo counts for production of child
2 pornography and their corresponding applicable guideline
3 calculations in groups below in separate charts. And the Court
4 is now going to describe the charts.

5 Bill or -- who's going to use the visualizer?

6 COURTROOM DEPUTY: I will.

7 THE COURT: Okay.

8 Would you please be seated, Ms. Kovoov and Mr. DeVito?

9 MS. KOVOOR: Sure.

10 THE COURT: First, the Court will display -- I can get
11 the lights.

12 The Court is displaying Pseudo Counts 1A, 1E, 1F, 1L,
13 1M, as in Mary, 1N, as in Nancy, 1O, 1R, 1T, 1U, 1W, 1X, and
14 1Y. As you can see, the base offense level for each of these
15 counts was 32. Because the victims were under the age of 12,
16 four points were added. Because there was a misrepresentation
17 of identity, two levels were added. That makes the adjusted
18 offense level for each of the counts in the above-listed chart
19 38.

20 Next are Pseudo Counts 1B, 1C, 1D, and 1V. And,
21 again, the base offense level is 32. Four points are added to
22 each of these because the victim was under the age of 12. Two
23 points are added to each of these counts because there was a
24 sex act. Two points are added to each of these counts because
25 of misrepresentation of identity. And, finally, two points are

1 added for use of a minor. That makes the adjusted offense
2 level for each of the counts in the above-listed chart 42.

3 Now for Pseudo Counts 1H, 1L, 1K, and 1Q, the base
4 offense level is 32 again. The victim under the age of 12 adds
5 four points. A sex act was performed which adds two points.
6 And there was misrepresentation of identity. And that makes
7 the adjusted offense level for each of the counts in the
8 above-listed chart 40.

9 MS. HALL: Your Honor, could I just bring one point?
10 You said this was applied to 1L. That's actually 1I in the
11 chart.

12 THE COURT: Oh, I'm sorry. Okay. For the record,
13 these were Pseudo Counts 1H, 1I, 1K, and 1Q.

14 Thank you.

15 Now for Pseudo Counts 1G, 1J, and 1AB, the base
16 offense level is 32. The victims in those cases, in those
17 counts, were between the ages of 12 to 16, there was a sex act
18 performed, and there was a misrepresentation of identity. Each
19 of those enhancements adds two points to the base offense
20 level. So the adjusted offense level for each of the counts in
21 the above-listed chart is 38.

22 And, finally, in Pseudo Counts 1P, 1S, 1Z, 1AA, and
23 1AC, the base offense level is 32. Two points are added to
24 each of these counts because the victim was between the age of
25 12 to 16 years old. And two points are added for a

1 misrepresentation of identity. And that makes the adjusted
2 offense level for each of the counts listed in the above-listed
3 chart 36.

4 And the court reporter will have a copy of the chart
5 so that they'll be part of the record.

6 Okay. You can come back up now. We're done with the
7 visualizer.

8 (Counsel and defendant complied.)

9 THE COURT: Next, I'm going to talk about Pseudo Count
10 2 which is possession of child pornography. The guideline for
11 a violation of 18 U.S.C. Section 2252A(a)(5)(B) is found at
12 Sentencing Guidelines Section 2G2.2. The base offense level
13 for that is 18 according to Sentencing Guideline 2G2.2(a)(1).

14 Two levels are added in accordance with Sentencing
15 Guidelines Section 2G2.2(b)(2) as the material possessed by the
16 defendant involved prepubescent minors that had not attained
17 the age of 12 years.

18 Pursuant to Sentencing Guidelines Section 2G2.2(b)(4),
19 four levels are added because the material depicted sadistic or
20 masochistic conduct.

21 Two levels are added in accordance with Sentencing
22 Guidelines Section 2G2.2(b)(6) because the offense involved the
23 use of a computer.

24 And Mr. DeVito possessed in excess of 600 images
25 containing child pornography; therefore, five levels are added

1 in accordance with Sentencing Guidelines Section
2 2G2.2(b)(7)(D), and that results in total points of 31.

3 Then the Court must make the multiple count
4 adjustment. Pursuant to Sentencing Guidelines Section 3D1.4,
5 Application Note 2, the procedure for calculating the combined
6 offense level when there is one -- more than one group of
7 closely related counts is as follows: First, identify the
8 offense level applicable to the most serious group and assign
9 it one unit; secondly, determine the number of units that the
10 remaining groups represent; three, increase the offense level
11 of the most serious group by the number of levels indicated in
12 the table corresponding to the total number of units. Units
13 are assigned pursuant to Sentencing Guidelines Section
14 3D1.4(a), (b), and (c). One unit is assigned to the group with
15 the highest offense level. One additional unit is assigned for
16 each group that is equally serious or from one to four levels
17 less serious. One-half unit is assigned to any group that is
18 five to eight levels less serious than the highest offense
19 level. And any groups that are nine or more levels less
20 serious than the group with the highest offense level are
21 disregarded.

22 The offense level is increased pursuant to the number
23 of units assigned by the amount indicated in the table at
24 Sentencing Guidelines Section 3D1.4. However, in a case in
25 which there are five or more units, the offense level is

1 increased by five levels. In this case there were 27 units
2 applied; therefore, five levels are added to the offense.

3 The combined adjusted offense level is determined by
4 taking the offense level applicable to the group with the
5 highest offense level and increasing the offense level by the
6 amount in the table at Sentencing Guideline 3D1.4. The group
7 with the highest offense level is Count 1 which is 42 points.
8 Therefore, five levels are added, making the combined adjusted
9 offense level 47.

10 Five levels are also added in accordance with
11 Sentencing Guidelines Section 4B1.5(b) (1) because the defendant
12 engaged in a pattern of activity involving prohibited sexual
13 conduct on at least two separate occasions.

14 The offense level determined under Chapters Two and
15 Three is 47. Therefore, in accordance with Sentencing
16 Guidelines Section 4B1.5(b) (1), five levels are added, and the
17 resulting offense level is 52.

18 Mr. DeVito accepted responsibility in this case in
19 accordance with Sentencing Guidelines Sections 3E1.1(a) and
20 (b). Therefore, the offense level is decreased by three
21 levels.

22 That makes the total offense level 49. Pursuant to
23 Chapter Five, Part A, Comment Note 2, since the offense level
24 exceeds 43, the total offense level becomes 43.

25 The Court finds the defendant has a criminal history

1 category of I.

2 An offense level of 43 combined with a criminal
3 history category I results in a guideline imprisonment range of
4 life. However, the statutorily authorized maximum sentence of
5 30 years is less than the minimum of the applicable guideline
6 range. Therefore, in accordance with Sentencing Guidelines
7 Section 5G1.1(a), the guideline imprisonment range becomes 360
8 months which is 30 years.

9 Pursuant to Sentencing Guidelines Section 5C1.1(f), if
10 the applicable guideline range is in Zone D of the Sentencing
11 Table, the minimum term shall be satisfied by a sentence of
12 imprisonment.

13 The authorized term of supervised release is at least
14 five years and up to life pursuant to Sentencing Guidelines
15 Section 5D1.2(b) (2).

16 The defendant is ineligible for probation because it
17 is expressly precluded by statute in accordance with Sentencing
18 Guidelines Section 5B1.1(b) (2).

19 The applicable guideline fine range is 50,000 to
20 \$250,000 pursuant to Sentencing Guidelines Section 5E1.2(c) (3).

21 There is a \$100 special assessment which is mandatory.

22 Restitution is applicable in this case. However, a
23 final restitution figure is still pending.

24 And there is also forfeiture.

25 Any questions on the guideline calculation before I go

1 on to the other factors that the Court considered under 18
2 U.S.C. Section 3553(a)?

3 MR. HEALEY: None from the government, Your Honor.

4 MS. KOVOOR: No, Your Honor.

5 THE COURT: All right. Then here are the sentencing
6 factors that the Court considered under 18 U.S.C. Section
7 3553(a).

8 When imposing sentence, the Court is required to
9 consider the provisions of 18 U.S.C. Section 3553(a) as well as
10 the proper application of the Sentencing Guidelines as
11 described in 18 U.S.C. Section 3553(a)(4) and (a)(5). The
12 Court must take into consideration the provisions of 18 U.S.C.
13 Section 3553(a)(1) which address the nature and circumstances
14 of the offense and the history and characteristics of the
15 defendant.

16 Mr. DeVito stands before the Court for sentencing on
17 one count of production of child pornography. The offense
18 behavior is serious and far reaching. In addition to the 25
19 victims involved in the instant offense, there are an
20 additional ten victims who have yet to be identified, and there
21 are numerous additional victims from the child pornography
22 possessed by the defendant. Mr. DeVito's conduct reached not
23 only minors throughout the United States, but also Australia.

24 Mr. DeVito persuaded numerous minor females to engage
25 in sexually explicit behavior at his direction. Mr. DeVito

1 instructed the minor victims to lasciviously display their
2 genitals and in some instances to insert markers, toothbrushes,
3 their fingers, or other objects into their anus and/or vaginas.
4 On some occasions, Mr. DeVito instructed the minors to take
5 actions that facilitated the criminal conduct. For example, he
6 instructed Minor Victim A to pull aside Minor Victim B's shorts
7 and underwear, exposing her vagina and anus. He then
8 instructed Minor Victim A to spread apart Minor Victim B's
9 genitals causing them to be lasciviously displayed. Absent
10 Mr. DeVito's instructions, some of the images of Minor Victim B
11 would not have constituted child pornography. Therefore, the
12 defendant utilized Minor Victim A to assist him in producing
13 child pornography.

14 In addition to the defendant producing child
15 pornography, he also possessed a large collection of additional
16 child pornographic images. These images contained prepubescent
17 minors engaged in sexual acts with adult males, bestiality,
18 bondage, and the lascivious display of their genitals. The
19 long-term psychological effect on victims of child pornographic
20 offenses is likely long term and extensive.

21 To date, the probation officer has received one
22 request for restitution. However, the victim impact statements
23 in this case remain pending. Therefore, restitution may be an
24 issue in the future.

25 The defendant is 34 years of age.

1 I believe you're 35 now, aren't you?

2 THE DEFENDANT: 35.

3 THE COURT: The defendant is 35 years of age, and the
4 instant offense represents his first felony conviction.

5 Mr. DeVito is married and has one child. He is a college
6 graduate and was gainfully employed at the time of his arrest.
7 He was previously dependent upon alcohol and suffers from
8 anxiety and depression. Mr. DeVito also suffers from an
9 addiction to child pornography and potentially video games.

10 The defendant's childhood involved a volatile
11 relationship between his parents and a life of solitude for
12 Mr. DeVito. He had a few close friends, so he often
13 disappeared in the online world of video games and/or
14 pornography. Mr. DeVito reported being inappropriately touched
15 by his half-brother on one occasion and alleged he forced
16 Mr. DeVito to perform oral sex on him. His half-brother also
17 introduced him to adult and child pornography at an early age.

18 The defendant's base offense level is 43 and his
19 criminal history category is I which results in an advisory
20 guideline range of imprisonment of life. However, the
21 statutory maximum term of imprisonment in this case is 360
22 months or 30 years. Therefore, the guideline imprisonment
23 range becomes 360 months.

24 The probation officer considered both a downward and
25 upward variance in this case, both of which were discussed in

1 the objections. However, it was determined that the
2 defendant's conduct overrides any mitigating information
3 related to his childhood. Taking into account the factors
4 outlined under 18 U.S.C. Section 3553(a), the probation officer
5 believes a sentence of 360 months is appropriate in this case.

6 Pursuant to 18 U.S.C. Section 3553(a)(4), such a
7 sentence is consistent with the kinds of sentences established
8 for the category of offense committed. It is believed a
9 sentence of 360 months imprisonment reflects the seriousness of
10 the offense, will adequately deter others from committing
11 similar offenses, and will protect the public from further
12 criminal behavior on the part of the defendant in accordance
13 with 18 U.S.C. Section 3553(a)(2). As a result, a sentence
14 within the guideline range avoids unwarranted sentence
15 disparities among defendants with similar records who have been
16 found guilty of similar conduct pursuant to 18 U.S.C. Section
17 3553(a)(6).

18 Following imprisonment, the probation officer
19 recommended that the defendant be placed on supervised release
20 for a term of life. This will provide an opportunity for the
21 Probation Department to assist him with reintegration into the
22 community after an absence as well as monitor his behavior.

23 Given the defendant's history, he could benefit from
24 participation in the following programs: Substance abuse
25 program -- and I'm not sure if he needs that or not because

1 there was some discussion that he no longer uses alcohol --
2 mental health treatment, to include a sex offender treatment
3 program. A lengthy term of supervision will help to ensure the
4 defendant completes treatment and does not fall into old
5 patterns of behavior. It will also ensure he has access to the
6 needed resources to assist him in reintegrating back in the
7 community after a lengthy absence.

8 Do the parties have any questions about the statutory
9 provisions applicable to the imposition of sentencing -- of
10 punishment in this case or the suggested sentencing guidelines?

11 Ms. Kovoor?

12 MS. KOVOOR: No, Your Honor.

13 THE COURT: Mr. Healey?

14 MR. HEALEY: No, Your Honor.

15 THE COURT: All right. Then we'll now proceed to
16 sentencing. And at this time, the Court will entertain
17 anything the parties wish to say in mitigation or aggravation
18 of sentence.

19 Ms. Kovoor, you're first.

20 MS. KOVOOR: Your Honor, I'd like to call Miss Cheryl
21 DeVito to the stand.

22 THE COURT: I'm sorry, who?

23 MS. KOVOOR: For mitigation, his mother.

24 THE COURT: Okay. Mrs. DeVito, would you please come
25 take the stand?

1 (Courtroom deputy conferring with the Court.)

2 COURTROOM DEPUTY: Stand up there, raise your right
3 hand, and be sworn in.

4 (Witness complied.)

5 COURTROOM DEPUTY: You do solemnly swear that the
6 testimony you're about to give in this case will be the truth,
7 the whole truth, and nothing but the truth, so help you God?

8 THE WITNESS: I do.

9 COURTROOM DEPUTY: Please be seated.

10 THE COURT: Ms. Kovoov, you may proceed.

11 CHERYL DEVITO

12 DIRECT EXAMINATION

13 BY MS. KOVOOR:

14 Q. Cheryl, could you state your name for the record?

15 A. Cheryl DeVito.

16 Q. Okay. What do you do for employment, Cheryl?

17 A. I'm a licensed optician.

18 Q. Okay. You are the mother of Richard DeVito?

19 A. Yes, I am.

20 THE COURT: Would you pull the microphone over
21 towards you? It moves. There you go.

22 A. Yes, ma'am.

23 Q. He's your only child; is that correct?

24 A. Yes.

25 Q. Okay. Could you explain your marriage to his father and

1 his half-siblings?

2 A. We were married for 30 years. There was a lot of animosity
3 between my stepkids and my son. Due to the fact that we had to
4 make ends meet for two families blended together, we both
5 worked. My son was kind of a latchkey child. He was alone a
6 lot. We tried to make everything fair between my stepkids and
7 my son. We would go up constantly and keep the family together
8 on visits.

9 Q. How old is Chris compared to Rick?

10 A. He at the time was like 15 when I guess I -- we learned
11 about this.

12 Q. You're referring to the sexual abuse?

13 A. Yes.

14 Q. You did not know at the time?

15 A. No.

16 Q. Okay. Could you describe to the Court Rick's demeanor when
17 he was growing up?

18 A. When he was young, till about six years old, he, I feel,
19 was a happy child. At six, here again, because we were
20 working, both of us, he would become a latchkey child and be
21 alone. He did go to a sitter, but then sometimes he would come
22 home and my husband would be tired from, you know, work too, he
23 worked nights sometimes, he would be sleeping. My son would,
24 you know, have access, unfortunately, because we didn't have a
25 united front about how to put locks on computers, you know --

1 Q. Was there a --

2 A. -- and TV.

3 Q. Was there an addiction to video games?

4 A. Yes.

5 Q. Okay. Did you know about any addiction to pornography,
6 whether adult or child?

7 A. No.

8 Q. Okay. Do you know whether he was depressed as a child?

9 A. Yes.

10 Q. Could you describe that to the Court?

11 A. Well, I -- he always mentioned that he would love to have a
12 big family, but we could not afford that. He already -- my
13 husband already had three children. And Rick was our only one.

14 Q. What was he like as a son growing up?

15 A. Very good. But, I mean, he -- the normal teenage years,
16 sometimes some adversity. Here again, no united front between
17 my husband and myself, which I blame both of us, you know; we
18 were stubborn. I would think that a rule would be good; he
19 would not agree.

20 Q. All right. There was some volatility in the home between
21 you and your husband; correct?

22 A. Yes.

23 Q. And that led to some police reports?

24 A. Yes.

25 Q. Domestic violence?

1 A. Yes.

2 Q. Other people witnessed it?

3 A. Yes.

4 Q. Mr. DeVito witnessed it when he was a boy?

5 A. Yes, he did.

6 Q. Did he come to your aid at times?

7 A. Yes, he did. At one point my husband was coming after me,
8 and my son came at him with a baseball bat, but he didn't do
9 anything, trying to protect me.

10 Q. Did he later on take care of his dad when he was dying?

11 A. He did. He loved his dad.

12 Q. What was your dad -- what was his dad diagnosed with?

13 A. He had a long, ongoing diabetes problem, noncompliant, then
14 developed Parkinson's-plus. And what took him, which my son
15 helped me with for three months in the hospital, was multiple
16 myeloma.

17 Q. Okay. During that same period of time, was Rick going
18 through other stressors in his life?

19 A. Yes. My mother that lived with us and was -- he adored, my
20 mother lived with us for eight years along with my husband.
21 She passed away. And Rick was her pride and joy, and he helped
22 me with her too.

23 Q. When you say "helped," what do you mean?

24 A. He would come after work and make sure that all her care
25 was taken care of. Even though caretakers were obstinate and

1 didn't want to make things happen, my son stepped up to the
2 plate.

3 Q. And the same thing for his father; is that right?

4 A. Yes.

5 Q. What did he do for his father?

6 A. Same thing. Going back and forth from hospital to rehab,
7 hospital to rehab. He was there all the time fighting for his
8 dad's health care.

9 Q. Did that create some problems with his marriage?

10 A. I'm sure it did.

11 Q. Okay. He also had a child during that period of time;
12 correct?

13 A. Yes.

14 Q. How often was he working?

15 A. It's like he was on call constantly.

16 Q. Okay. What was he doing for work?

17 A. He was a materials manager at a manufacturing firm.

18 Q. Okay. Here in Florence, Kentucky?

19 A. Yes. Um-hmm. Linamar.

20 Q. Do you know how much he was making at the time?

21 A. About 85,000.

22 Q. Okay. And that's at 33 years of age; correct?

23 A. Yes.

24 Q. Was providing for his wife and child?

25 A. Yes. And also he helped me too.

1 Q. The Court can listen to your description of his
2 characteristics, his personal history. Is there anything that
3 you want to tell this Court about your son?

4 A. My son's a good man. He is a human being that made many
5 mistakes and deplorable acts, yes, that hurt many. It is not
6 my son, though.

7 Q. Do you think he could benefit from treatment?

8 A. Yes, I do. I think he's been remorseful from the very
9 beginning and he wants treatment.

10 Q. Does he sometimes seem angry and stressed and agitated?

11 A. Yes.

12 Q. Why is that?

13 A. I think because of the situation he's in right now, he's
14 never experienced anything like that.

15 Q. And neither have you?

16 A. No.

17 Q. He's a first-time offender and offended big?

18 A. Yes.

19 Q. Okay.

20 A. I guess he goes big in every way, unfortunately.

21 Q. Do you feel that he's remorseful?

22 A. I feel he's very remorseful, and he has been from the
23 beginning. He's not a liar. He knows what we went through.

24 And here again, it's -- I'm not just blaming --

25 Q. What?

1 A. -- my husband. It's we were stubborn. We were obstinate.

2 Q. So he lived a very solitary life?

3 A. Yes.

4 Q. And his time went into videos and ultimately pornography
5 that you know now?

6 A. Yes.

7 Q. Okay. Does he want treatment?

8 A. Yes, he does.

9 Q. He's asked for that?

10 A. He's asked for that and has been denied by Butler County
11 when we tried to get extra treatment --

12 Q. Thank you, Your Honor.

13 A. -- there.

14 Q. Thank you.

15 A. Thank you.

16 THE COURT: Mr. Healey, do you wish to cross-examine?

17 MR. HEALEY: Can I just talk with Sarah for just a
18 second?

19 THE COURT: Yes, sure.

20 (Mr. Healey conferring with Ms. Kovoov.)

21 BY MS. KOVOOR:

22 Q. When did Mr. DeVito's Dad pass?

23 A. 2013.

24 Q. Thank you.

25 A. And may I say my mother passed away in 2016 and then his

1 uncle four days after he was taken in.

2 THE COURT: Do you wish to cross-examine?

3 MR. HEALEY: No, Your Honor. Thank you.

4 THE COURT: Okay. The Court appreciates your
5 testimony, Ms. DeVito, and you are excused.

6 THE WITNESS: Thank you. All right. Thank you.

7 THE COURT: Thank you.

8 Ms. Kovoov.

9 MS. KOVOOR: Do you want me to give a closing, Your
10 Honor, at this point?

11 THE COURT: Yes. Finally, allocution, yes.

12 MS. KOVOOR: Well, Mr. DeVito does want to speak.

13 THE COURT: Yes. I want both -- I'm going to give
14 both of you the opportunity to speak.

15 MR. HEALEY: May I speak, Your Honor? Sorry.

16 THE COURT: Yes, go ahead.

17 MR. HEALEY: We have Minor Victim X's mother here.
18 She would like to give a statement. I was wondering if maybe
19 she could do that now. She's been here all morning.

20 THE COURT: Yes. I didn't realize that --

21 MR. HEALEY: I don't know how much time she has.

22 THE COURT: Yes. I didn't realize she was here. Yes,
23 let's do that. I apologize for making her wait all day. I
24 didn't realize she was here.

25 Thank you for coming, and I'm sorry I made you wait

1 all day.

2 MS. MILLER: That's okay, Your Honor.

3 THE COURT: I'm going to have my courtroom deputy
4 swear you in, if you don't mind.

5 COURTROOM DEPUTY: If you could please raise your
6 right hand.

7 (Ms. Miller complied.)

8 COURTROOM DEPUTY: You do solemnly swear that the
9 testimony you're about to give in this case will be the truth,
10 the whole truth, and nothing but the truth, so help you God?

11 MS. MILLER: I do.

12 THE COURT: Would you be more comfortable on the
13 witness stand, or do you want to just stand there?

14 MS. MILLER: No, Your Honor. I'd like to stand.

15 MR. HEALEY: Typically the victims, when they give
16 their impact statement, they aren't subject to like swearing in
17 and cross-examination, Your Honor.

18 THE COURT: Well, no, I didn't intend for
19 cross-examination.

20 MR. HEALEY: Okay. I just wanted to make sure. We
21 did not discuss that with her if that was the case.

22 THE COURT: No.

23 MS. MILLER: That's okay. This is the truth anyway.

24 THE COURT: There'll be no cross-examination --

25 MS. MILLER: It doesn't matter.

1 THE COURT: -- for a victim impact statement.

2 You may proceed. Would you state your name for the
3 record?

4 Bill, do you have some tissues?

5 MS. MILLER: Thank you.

6 My name is Sherie Elizabeth Miller.

7 Anything else? Can I start?

8 THE COURT: Sure.

9 MS. MILLER: Okay. My daughter is Victim X. My
10 daughter was nine years old when she was violated. My
11 daughter's life is forever changed because of his selfish acts.
12 He had no right to see her, take pictures of her, record her,
13 or expose her to his sick, disgusting, and illegal behaviors.

14 Please know that even though he might not have met my
15 daughter in person, he has done tremendous damage. This has
16 been psychologically devastating to her. This has severely
17 impacted our family. I'm not going to go into detail about the
18 horrible ways he has hurt our lives. I'm not going to give him
19 the satisfaction of knowing. He doesn't deserve to know
20 anything more about my daughter.

21 He purposely and selfishly committed criminal acts
22 against my child and hundreds of other children. His witness
23 testified he is smart, college educated, and was working in a
24 management position. He was disgusted by his behavior, yet he
25 didn't get help. He didn't stop. He was smart enough to know

1 that he needed treatment, yet didn't get any. He knew what he
2 was doing was wrong and criminal. He knew his behavior would
3 have lifelong consequences to these children, yet he did it
4 anyway. He chose his behavior. Those children didn't get a
5 choice. He is disgusting, but this shouldn't make his sentence
6 less than 30 years. It should make it the maximum you could
7 possibly impose.

8 He violated my daughter and hundreds of others. Their
9 images are now out there for the world to see. We can't get
10 them back. My daughter might be notified at any time for the
11 rest of her life as well as the other victims. Our lives
12 changed when the FBI Crimes Against Children Division and
13 Victims Advocate came to our door. He deserves to have his
14 life changed for the rest of his life. He deserves more than
15 30 years. He deserves 87 to 108 years, not months.

16 He is a first-time offender, but only because this is
17 the first time he was caught. All of his victims should be
18 taken into consideration, not just Victim A. Nothing about
19 what he did to my daughter or any of the other victims is
20 run-of-the-mill. A good man, as his mom stated that he is,
21 does not commit crimes against children.

22 We've heard a lot about his sexual assault as a child.
23 I'm a victim of sexual assault as a child. I'm also the victim
24 of sexual assault during my eight years in the military. I
25 have never had any sexual photos, images of children, committed

1 any crimes against anyone, let alone children, even though I
2 have a past. I got treatment. I got treatment as an adult.
3 He could have done the same.

4 Your Honor, please sentence him for as -- for as long
5 as you possibly can. Please give him the maximum sentence for
6 my daughter. Please speak for all of the victims who can't.

7 Thank you for hearing my statement. Thank you to the
8 FBI agents, victims advocates, attorneys, and everyone else
9 involved in catching pedophiles and making sure the victims get
10 justice.

11 THE COURT: Thank you very much. Thank you for
12 coming.

13 Anything else? Are you going to read the other victim
14 impact statements?

15 MR. HEALEY: I don't believe that will be necessary,
16 Your Honor. Thank you.

17 THE COURT: All right. Ms. Kovoor, you and Mr. DeVito
18 are going to speak, if you want, so I don't care which order
19 you want to do it in.

20 (Ms. Kovoor conferring with the defendant.)

21 MS. KOVOOR: Your Honor, I also have some character
22 letters I believe that were already provided to the Court, but
23 I can give another copy, if you like.

24 THE COURT: Okay. I think they were attached, yes, to
25 one of the submissions I got.

1 THE DEFENDANT: Your Honor, I stand before you today
2 as a man who deeply regrets the actions and the pain and
3 suffering that I've caused. As a father myself, I'm ashamed
4 and disgusted.

5 I apologize to the children I've hurt and regret I
6 could not bring myself to face my demons before and allowed
7 myself to inflict these harms. I should have found strength to
8 seek help and properly address my sickness and sadness before
9 my downward spiral. To escape the isolation and the mental
10 prison I had held myself in before, I allowed it to subject me
11 to the physical prison I'm in now.

12 I understand now that this isn't something I can do
13 alone. That being said, I want to apologize to my wife, my
14 daughter, and my mother who I love very much who I've also hurt
15 by my actions and thank them for the support that they've
16 shown. I acknowledge the harm I've done to others and hope I
17 will get a second chance to show everyone that I'm better than
18 this mistake and try to repair the harm that I've done.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. DeVito.

21 Ms. Kovoov.

22 You may sit down, if you want, Mr. DeVito.

23 (The defendant complied.)

24 MS. KOVOOR: Your Honor, I am a former state felony
25 prosecutor who did sexual assault crimes and then have done

1 defense work for the last 15 years. The federal system here
2 is -- I just find -- I'm dumbfounded because I saw Mr. DeVito
3 accept responsibility. At the time of the motion to suppress,
4 he stated clearly that he accepted. Not one child had to
5 testify. No one had to bring a child to court. And yet, that
6 acceptance of responsibility is not really giving him any
7 benefit because with the guidelines and how they're calculated
8 and these multiple enhancements, he's looking at lifetime for a
9 non-life offense, for a child pornography charge that is a
10 non-life offense statutorily.

11 He did not commit murder. He did not commit domestic
12 terrorism. But based on how these calculations and
13 enhancements are stacked up, some of them which are doubly
14 punitive, are part of the elements of the offense, he's looking
15 at a minimum of 15 years. This in a state court is -- people
16 are looking at probation or two or three years.

17 Even in the Sixth Circuit there's been U.S. v. Lowry,
18 U.S. v. Damron where individuals have sought out 25 other
19 victims and actually sought to meet with them and received more
20 mercy from the government than he has.

21 He stood here before you today as a man who is very
22 sorry for his conduct and is socially outcasted. I understand
23 any victim coming in here and stating what it did to her and
24 her family. However, there's been no evidence here there's
25 been hundreds of children. There's been no evidence that this

1 was captured in the clouds and never to be wiped off; that this
2 is permanent. That is, I have never been provided information
3 regarding all of these pseudo counts as to their ages, their
4 jurisdiction, you know. I have the affidavit of the police
5 officer, and we're talking five days of chats between him and
6 one individual. There was absolutely information provided to
7 the Probation Department regarding the eight-year-old talking
8 to her cousin and other facts of that particular victim's case,
9 but regarding all these other pseudo counts, we don't know
10 whether -- what duration they were, whether it was the same
11 duration as the offense that he pled to, where this happened,
12 the ages of the children, whether there was in fact an identity
13 misrepresentation. We don't know that.

14 And in this case, like other child pornography cases,
15 these guidelines are being used to imprison an individual like
16 him who's never, ever even been charged or arrested or alleged
17 that something he did anything wrong. I don't even know if
18 he's had a previous traffic ticket before this, and he's
19 looking at a minimum of 15 years. You could give him 15 years
20 where he would come out at the age of 50 years old, where we
21 all know where recidivism, it decreases just by age. He's 35
22 now. If he gets the minimum, he's 51 when he gets out. His
23 three-year-old daughter is going to be an adult by that time.
24 We don't know what the health and existence of his mother will
25 be at that time. But that's what we're begging for is the

1 minimum. And this is for a first-time offender.

2 He doesn't dispute that he did something horribly
3 wrong; that it was vile. What he's been upset with is sitting
4 in a cell for two-and-a-half years, and he's agitated and he's
5 frustrated because he does not understand how what he did
6 equates to somebody who's been charged with multiple rapes or
7 murder in terms of sentencing. And that's why I had let
8 Mr. Pimentel here to show how these guidelines which were done
9 by Congress, people who are running for election, and not
10 supported by empirical evidence, not supported by research,
11 where there's been criticisms by the U.S. Sentencing
12 Commission, there's been criticisms by other federal judges.
13 For example, the use of a computer. One federal judge likened
14 it to an OVI where you're charged with drinking while driving
15 and then you're charged with using a car. The use of the age
16 of a child. This is child pornography. It's already part of
17 the element of the offense.

18 All I'm saying is that the accuracy of the presentence
19 investigation report that was provided by the Probation
20 Department is something that we had no ability to question
21 because just the federal child porn statutes, we could not -- I
22 could not view the actual child porn, I couldn't decipher the
23 ages, I don't have an investigator out there like in other
24 cases where I could determine, yes, that child was 14; yes, he
25 used a pseudo name. I don't have that information. I have to

1 take it -- I have to trust that that investigation was done
2 properly.

3 As I said previously, a lot of the vagueness, the
4 misinformation, the noninformation should go to benefit the
5 defendant, not the government in this case. Since at the time
6 of plea when he stood here before you and he accepted
7 responsibility and stated that there was similar conduct with
8 25 other girls, and he specifically also wanted it stricken
9 that he instructed any child to have sexual conduct with an
10 animal, that should have been it. But now it's 30, it's 33,
11 it's ten more; it's instruction to the child regarding the dog.
12 That was not part of what I -- and I was present there at that
13 time.

14 I just feel that not only are the Congressional -- are
15 these guidelines unfair to somebody like Mr. DeVito who is a
16 first-time offender but who captured videos or had Facetime
17 with young children. It's just -- it doesn't make sense
18 because it's making a statute -- a child porn case like a life
19 offense charge. It just -- it doesn't -- it's nonsensical. It
20 doesn't make sense. How can he have a life calculation for
21 something where the minimum is 15 and the maximum is 30?

22 They're flawed, and the resulting advisory guideline
23 range should not warrant the same weight that it might deserve
24 in other cases involving guideline provisions. Federal Courts
25 have dealt with these anomalies and inappropriateness of

1 sentences, such as in the cocaine cases and crack cocaine. And
2 this is so in the United States versus Henderson where the
3 Sentencing Commission court scholars have all repeatedly
4 criticized these guidelines. In United States versus Dorvee, a
5 Second Circuit case in 2010, the Court stated that the
6 guideline is fundamentally different from most and that unless
7 applied with great care can lead to unreasonable sentences that
8 are inconsistent with 3553 and it requires engaging in an
9 in-depth analysis of the various flaws, including the
10 irrationality of certain enhancements.

11 I'm not going to belabor this Court. We've heard this
12 from the probation officer who was an expert in this case. But
13 using these guidelines makes no sense when this man is facing
14 15 years as a minimum. After that, you could have him for
15 lifetime supervision. And we've heard from the witnesses, both
16 Dr. Connor and the probation officer, that these tools, these
17 tools that the Probation Department has, works. Polygraphs,
18 registration, continuous monitoring; they work. And they would
19 work for somebody who's 50 years old at that time to make sure
20 that there's specific deterrence. We know there's general
21 deterrence because most child pornographers don't even get
22 prison time. If they do, it's minimum. But here in his case,
23 given all of these pseudo counts and these multiple
24 enhancements that stacked, his minimum is 15 years. If he gets
25 out at 50, you can control his behavior and monitor him and he

1 can get treatment sooner than later. He can get treatment 13
2 years down the line versus 28 years down the line. Because as
3 we heard, the Bureau of Prisons generally does the treatment
4 two years before they are brought back into the community.

5 Dr. Connor even said he would be a good candidate for
6 community treatment, meaning right away, if that was available
7 to him. It's not. He's ineligible for that by the statute.
8 It's so draconian, the statute and the penalties right now.
9 And this is because of the anticrime wave. It's very easy to
10 say child pornographers should get life or the death
11 penalty, drug dealers should get the death penalty as we've
12 heard recently in the news. It's very easy to say that because
13 it's popular. Does it make sense? Is it fundamentally fair?

14 And in terms of horizontal sentencing in this own
15 Circuit, there have been individuals that have done more than
16 Mr. DeVito has, have had actual hands-on contact, have reached
17 out to kids. He never did. He never intended to meet them,
18 never wanted to meet them, never stated so.

19 The widespread use of technology now also has not
20 caught up -- the law has not caught up with it. We just heard
21 information, and it's in the sentencing memorandum as well,
22 that it was captured and is permanently there. There's no
23 evidence to that. This was Facetime conversations. They're
24 gone as soon as the person ends the conversation.

25 He has a supportive family. He's admitted his

1 conduct. He wants treatment. He has everything -- everything
2 that -- if there's any case that cries out for the minimum
3 sentence, this is it.

4 You can take into account as part of 3553 his age,
5 he's 35, 33 at the time of the offense; his personal
6 characteristics. He was working as a manager in Florence,
7 Kentucky, auto manager. Same job that his dad has. He was
8 making \$85,000 a year. He was renovating two homes, taking
9 care of ill family members, taking care of his mother. His
10 wife is still here supporting him. That shows he must have
11 some redeemable qualities despite his sickness, and it is a
12 sickness.

13 And one of the other things I wanted to say was, and I
14 understand from victims' perspective that, you know, he should
15 have gotten help, it's very hard for somebody in our society to
16 say that I think about young girls. I had a 15-year-old boy
17 who is valedictorian, baseball player, cry out for help in an
18 attempted suicide. What happened? They found pictures. He
19 was charged. This is what happens in our society. He knew
20 that. He went through depression, chronic depression, chronic
21 stress, and that's what led to him behaving the way he did. I
22 think that he is intelligent enough of a man, has enough
23 support to really benefit from treatment here, and that's after
24 15 -- 13 years of being incarcerated. For a man who's never
25 spent a day in prison before this charge, that's a huge amount

1 of time.

2 I ask you to look at the fairness of these guidelines,
3 how they're applied to him. The use of the computer
4 enhancement, the use of the age, those are parts of elements of
5 the crime. I don't under -- I'm befuddled. I don't understand
6 how you can be charged with this and then get enhanced by an
7 element of the offense. The sadomasochistic elements, the use
8 of a sexual act. Well, this is child pornography. There is
9 going to be lascivious conduct. There is going to be genitalia
10 exposed. So, again, I just feel it's doubly, triply punitive,
11 and grouping all of these yields an anomalous, unfair result.

12 And it really -- I mean, it doesn't separate the worst
13 from Mr. DeVito. He can benefit from help. He didn't go out
14 there and rape people or try to contact people, meet with these
15 girls. He did something terribly wrong that will impact a lot
16 of people, a lot of girls for just like it impacted him. And
17 he knows that. But 15 years for that, that would show a
18 deterrence, both specifically and generally. It would give him
19 rehabilitation time. It would support the reason why we
20 sentence people like him. To show punishment, yes, but to give
21 him time to rehabilitate himself, to then get treatment and
22 then to go out back into society as a changed person.

23 So I ask you to look at the history and
24 characteristics of this defendant and not just what he did.
25 But even with what he did compared to the U.S. v. Lowry, U.S.

1 v. Damron, other cases in this court where individuals have
2 gotten under ten years for worse conduct just because of the
3 charging and the pleaing involved.

4 There are multiple character letters there by Miss --
5 by members of the community. I think it shows that there are
6 people who believe in him and that believe that if he got the
7 right help, that he could at least live a decent life. I think
8 Dr. Connor has worked in federal prisons, has worked with sex
9 offenders, and what did he say? No psychopathy, no sociopathy,
10 no narcissism. I've worked with him for a year, and I've been
11 frustrated with him because he's obsessive-compulsive and he
12 writes notes and he is very detailed and he can be very --
13 but -- very demanding, but he's sitting in a cell with a toilet
14 there and a bed and something this man has never been used to
15 thinking about his case and hearing that this individual got
16 five years for rape where he is looking at a minimum of 15.
17 And I understand his frustration.

18 I ask you to really review Dr. Connor's testimony, and
19 the question was would he be amenable to treatment, and his
20 answer was absolutely, even within the community. Somebody
21 like that, like I said, this case screams for the minimum, and
22 five years supervision to lifetime supervision, whatever the
23 Court deems appropriate.

24 Thank you.

25 THE COURT: Thank you, Ms. Kovoov.

1 How long are you going to be?

2 MR. HEALEY: Maybe 15 minutes, Your Honor.

3 THE COURT: We've been sitting almost two hours.

4 Let's take a break.

5 MR. HEALEY: Okay.

6 THE COURT: We'll take a 15-minute break.

7 (Recess in proceedings from 1:33 p.m. to 1:49 p.m.)

8 AFTER RECESS

9 THE COURT: You may proceed, Mr. Healey.

10 MR. HEALEY: Thank you, Your Honor.

11 Part of the problem here is Mr. DeVito doesn't
12 appreciate the seriousness of his offense. He spent his entire
13 sentencing hearing, his pro se motions, comparing himself to
14 defendants who commit possession of child pornography offenses.
15 He ignores his manipulation of these young girls. He ignores
16 how he got into their bedrooms through the internet, how he
17 instructed them to do vile acts. He ignores how integral he
18 was to them sexually abusing themselves on these camera -- on
19 their cameras. And these are videos that may live forever on
20 the internet. We don't know, Your Honor. There haven't been
21 any hit yet -- hits yet as far as distribution, but only time
22 will tell whether or not these videos have been shared with
23 others. And just like you heard from Miss Miller, all those
24 other families are just waiting one day to find out whether or
25 not the sexual exploitation of their daughter is going to end

1 up in the home of some other pedophile who is doing Lord knows
2 what to those images.

3 To the extent that Ms. Kovoor raised, you know,
4 they've never had an opportunity to look at this evidence, Your
5 Honor, that couldn't be further from the truth. When she says
6 we didn't make anything available to her, she was over at the
7 FBI. We were showing her the videos. There's just so many to
8 go through. We have each and every one of the minors that we
9 provided to Probation listed. We have their photos. We
10 submitted it to you. To the extent they want to challenge
11 it -- can I use the --

12 THE COURT: The visualizer?

13 MR. HEALEY: -- the visualizer for a second?

14 THE COURT: Yes. Sure.

15 Bill.

16 COURTROOM DEPUTY: Hold on one second.

17 I'll get it, Kyle.

18 MR. HEALEY: I don't want to mess it up.

19 This is Gxxxx, Your Honor. This is Minor Victim A.
20 This is the girl that Mr. DeVito got the videos of her dog
21 licking her genitalia. This is the girl that he instructed to
22 go perform oral sex on her father. She's eight. She lives in
23 Lubbock, Texas.

24 This is her cousin that he was trying to get her with.

25 This is Lxxxxxxx Kxxxxxxx from Portage, Michigan.

1 These are her two friends, Mxxxxx, also from Portage, and
2 Kxxxxxxx from Portage. These are the girls that Mr. DeVito had
3 inserting their fingers into each other butts.

4 He says he doesn't know who these kids are. We made
5 this evidence available to him. It's horrific. We've shown
6 some of it to you, Your Honor.

7 This wasn't some innocent online possession of child
8 pornography. That's not what he was up to. He had a laptop
9 full of child pornography, Your Honor. He had it in the back
10 of his truck when the FBI did the search warrant at the house.
11 It was what you would call the standard internet downloaded
12 child pornography. Even some of the victims from those child
13 pornography videos put restitution claims in on this case, and
14 they subsequently withdrew them when they found out how many
15 production victims he had. Had he just stuck to that laptop of
16 child pornography and just watched videos that other people
17 created, we would be having a much very different conversation
18 today, but that wasn't enough for him. He found 30 kids
19 online, and he manipulated them to create child pornography for
20 him for his own viewing, for his own pleasure. That's wholly
21 different than all these cases he puts before the Court. His
22 sheer number of victims is wholly different, Your Honor.

23 He makes a big idea about Mr. Lowry and the sentence
24 that he got. What he points out in his own motion, though, is
25 their cases really aren't similar. Mr. Lowry just solicited a

1 bunch of people. He didn't actually get child pornography from
2 all those kids, unlike Mr. DeVito.

3 He makes a big claim about Mr. Damron who got 200
4 years and he has a prior sex offense. Your Honor, Mr. Damron's
5 guidelines were a level 39, ten levels lower than Mr. DeVito's.
6 Mr. Damron had one victim in his case. He didn't have the
7 number that Mr. DeVito had. That's why his sentence is lower.

8 He relies on U.S. v. R.V., Your Honor. That's also a
9 possession of child pornography case where the Court gave a
10 huge reduction to a defendant in that case. But there's
11 something the Court wrote in there that I think's important
12 because that Judge went through and classified what he viewed
13 as seven iterations of child pornography offenders from least
14 to worst. He put the least as possession only of child
15 pornography users. He then went to possession and involuntary
16 distribution. He went to possession with intentional
17 distribution. The next level is possession with intentional
18 distribution for commercial gain. And then online
19 communications with minors without intent to engage in contact.
20 And then online communications with minors intending to engage
21 in contact. And the last highest category, Your Honor,
22 production of child pornography. Of those defendants, the
23 Court wrote, "Defendants in this category engaged, and are most
24 likely to engage in the future, in sexual exploitation of a
25 minor. This group potentially constitutes a most serious and

1 dangerous category of child pornography offenders. Defendants
2 in this category can be further differentiated based on factors
3 such as the type of images produced, the quantity, and their
4 role in the production. Some involve photographing rapes of
5 young children by a parent and other relatives or friends of
6 the family. Such incestuous relationships are particularly
7 hard to ferret out."

8 What Mr. DeVito fails to realize is he's in the last
9 category. He's been trying to convince the Court that he's in
10 the first category, but he's not there. His conduct is too
11 serious, his communications with these victims too many. He
12 was too integral to the creation of these videos.

13 In reading his own pro se sentencing memo, it doesn't
14 take much to understand why his attorney didn't want that
15 fired -- or filed. Miss Kovoov did a good job laying out a
16 very mitigating case for him in her memo. Mr. DeVito filed his
17 pro se memo and washed all that away. If you read his pro se
18 memo, Your Honor, it reads as if he's the victim of this
19 offense. He minimizes his conduct. He refers to these videos
20 as sexting. And he refers to his conduct as asking. He says,
21 oh, it's mitigating because I didn't threaten or extort these
22 women. No, Your Honor, he didn't have to threaten or extort
23 them. They were eight years old. He just manipulated them.
24 That is in no way redeeming.

25 He says he just wants a fair and appropriate sentence,

1 Your Honor, and he, with I think the utmost irony, complains
2 that he's already been treated unfairly because he's been held
3 in jail over 800 days. He takes no self-awareness for the fact
4 that he went through about seven attorneys in that span. You
5 know, he acts -- he claims that, you know, we're treating him
6 as if he molested a bunch of kids. I think things need to be
7 put in balance for him. No one's treating him like he molested
8 that number of kids. If he molested 25 kids, would we really
9 be here talking about a sentence between 15 and 30 years? No
10 way. If he molested 25 kids, we'd be talking in the hundreds
11 of years for that sort of conduct.

12 In another twist of irony in his memo, he complains
13 that, you know, his incarceration would cost the taxpayers a
14 lot of money. He didn't have those same concerns when the
15 Court appointed Candace Crouse to represent him for free. He
16 didn't have those same concerns when he requested to subpoena
17 the eight-year-old victim, Gxxxx, in this case and make her
18 come up from Texas so he could examine her about his conduct in
19 this case. He wanted to question the eight-year-old, and he
20 wanted the taxpayers to pay for it because he said he didn't
21 have the money. But in the sentencing memo, he has the nerve
22 to claim that the taxpayers shouldn't pay for his
23 incarceration; you should just let him out?

24 He also raises in his memo, Your Honor, that he had
25 these consent documents that he gave to search these Cloud

1 accounts and that led to the arrest or leads to 60 defendants
2 and he never got credit for that. Your Honor, we never got the
3 consent documents back. His lawyers never sent them to us. We
4 spoke with Ed Perry about it. Ed was like, "He signed them,
5 but I'm not allowed to send them to you yet." He goes, "He's
6 got some stipulations about it." I brought the whole letter we
7 sent Ed about the consent of, hey, Rick, if you want to get
8 ahead of this, this is what we can send you. It laid out how,
9 hey, this consent is just you trying to accept responsibility
10 early. He didn't want to do it.

11 The one good thing that I think we have in this case,
12 Your Honor, is the report by Dr. Connor. I think Dr. Connor
13 did good work in evaluating Mr. DeVito. I do think it's
14 helpful. I think we need to limit how helpful it is, though,
15 because as Dr. Connor kind of explained, he had such a limited
16 view of the conduct that Mr. DeVito had engaged in. He just
17 had the conduct from the complaint. Well, after Rick was
18 arrested, we learned about all these other victims when we
19 started getting the search warrant evidence from OoVoo. And
20 Dr. Connor testified here to you, Your Honor, about when, you
21 know, Mr. DeVito is sending the minors to go out and do things
22 to other minors, sending things out to your dad, that's
23 actually more troubling than the conduct he was led to believe
24 and how that may have impacted his evaluation.

25 Lastly, he talked about that cognitive distortion

1 score and it's the justifications for his action. And,
2 candidly, I don't think we needed to see that report. If you
3 read Rick's filings, I mean, he feels like he's the victim
4 here. He's trying to justify what he's done; that the lawyers
5 have been unfair, his lawyers have been unfair to him, the
6 government has been unfair to him, the FBI has been unfair to
7 him, and the Court's been unfair to him. He's been the victim
8 throughout these entire proceedings in his own mind. But the
9 reality is it's his conduct that got him here. It's his
10 communications with these minors that got him here.

11 Your Honor, they've made much blame about, you know,
12 Mr. DeVito's previous sexual abuse. As we laid out in our
13 sentencing memo, Your Honor, that is in no way mitigating for
14 this offense. It talked about how he helped his dad when he
15 died; that created a lot of stress in his life. Your Honor,
16 losing a father, terrible. Unfortunately, it's something that
17 many Americans, many individuals will go through during their
18 life. It happened in 2013, though. He's committing this
19 offense in 2016. How long of a grieving period do you get for
20 your -- for losing your father, and how would that in any way
21 justify the conduct that he engaged in? There's no correlation
22 between the loss of a loved one and sexually abusing minors.

23 The defendant's legal ramblings even go a little
24 further off the rails. I mean, he demands, you know, early
25 release under the Second Chance Act, Your Honor. I probably

1 should have filed this with you, but under the Second Chance
2 Act, 2251, the production of child pornography statute, is
3 specifically excluded from being reduced under there. It's
4 written in the statute, Your Honor. It's 18 U.S.C.
5 3632(d)(4)(D)(xxxix). There's a list of offenses, many
6 involving the exploitation -- many involving offenses against
7 children, that are specifically not eligible for reductions
8 under that Act.

9 He then wants access to TRULINCS in the Bureau of
10 Prisons. Your Honor, under Bureau of Prisons policy, he's
11 plainly not eligible. Their policy states, "For example,
12 inmates with personal history of or prior offense conduct or
13 conviction for soliciting minors for sexual activity, or
14 possession/distribution of child pornography through the
15 internet or other means, are excluded from program
16 participation based on their history." He's not eligible for
17 this program, Your Honor. Moreover, Dr. Connor said giving him
18 access to something like this would actually be a bad idea
19 until he's treated. His own doctor testified, well, he can't
20 have a phone, he can't have access to those things; if he has a
21 computer, it's got to be locked.

22 I think the unfortunate thing about this case, Your
23 Honor, is Mr. DeVito's life showed a lot of promise. He was
24 married, he had a kid, he had a good job. There's no excuse
25 for this offense. The number of victims, Your Honor, are too

1 many, the depictions too vile. The guidelines in this case are
2 30 years. His conduct is merited.

3 Nothing more, Your Honor. Thank you.

4 THE COURT: Thank you, Mr. Healey.

5 Is there anything else?

6 MS. KOVOOR: No, Your Honor.

7 THE COURT: All right. The Court had more filings in
8 this case than it's had in any case before, both from the
9 defendant himself and his counsel and the government. There
10 were letters of recommendation for the defendant which were
11 nice letters. There was also the memo that he filed, the last
12 thing he filed, and I've got some immediate reactions to
13 Mr. DeVito's contentions.

14 First, Mr. DeVito completely failed to grasp the
15 seriousness of this case or the negative impact of his
16 predatory behavior on the child victims and their families. In
17 his pro se sentencing memo, he refers to his conduct as
18 sexting. He also blames the depths of an uncontrolled sickness
19 and sadness for the eventual discovery of a variety of social
20 media applications that led to online communication in which
21 sexually explicit texts and images were shared. Indeed, he
22 still only admits to interacting with Minor Victim A between
23 August 6 and August 11th, 2016, stating exposing her to his
24 sickness, Richard was now no better than his own abuser and
25 deeply regrets losing control to the point another victim was

1 created. He makes no mention of the numerous other children
2 and the numerous other videos he made.

3 Secondly, the cases he cites involve different crimes
4 than the production of child pornography to which he pled.
5 Specifically, the cases mentioned were Lowry and Damron. Lowry
6 was a coercion and enticement of a minor, and Damron was sexual
7 exploitation of a minor.

8 Lowry, who pled guilty to one count of coercion and
9 enticement, was sentenced to 144 months imprisonment,
10 supervised release for life, and a \$100 special assessment. He
11 was 24 years old at the time of his offense. He used his real
12 name on Facebook to solicit males for sexual encounters, and he
13 did not place an age limit on his solicitations. And he
14 communicated with 26 grown men as well as 14 boys who turned
15 out to be ages 14 to 17, and he only ultimately had physical
16 conduct -- contact with one 17-year-old boy who had already
17 fathered a child. And he offered money for nude photos from
18 the men or boys, but he did not instruct the men or boys
19 regarding the content of the photos, and no videos were
20 exchanged.

21 In contrast to that, Mr. DeVito, who pled guilty to
22 one count of production of child pornography, was 32 at the
23 time of his offense. He posed as a 13-year-old boy using false
24 screen names and photo on websites like Musically, which are
25 known to be frequented by children, and targeted prepubescent

1 females age 7 to 12. He enticed the children to meet him on
2 other more anonymous apps, including OoVoo and Kik. So it
3 wasn't just use of a computer, it was use of a computer to use
4 the special enhancements that the computer has. He provided
5 via video and/or explicit messaging explicit instruction in
6 pornography to at least 25 young children, age 7 to 12,
7 detailing exactly what he wanted them to do, including, but not
8 limited to, inserting household items into bodily cavities,
9 masturbating, engaging in pornographic acts with other young
10 children, engaging in a sex act with a dog, and encouraging one
11 child to masturbate in front of her father in an effort to get
12 the child to perform a sex act on her own father. And he saved
13 video recordings and/or screen shots of all these activities
14 which the Court has viewed.

15 The Damron case, another case that Mr. DeVito cites,
16 where Mr. Damron was sentenced to 200 months imprisonment,
17 supervised release for life, he took sexually explicit photos
18 of one child, his girlfriend's five-year-old daughter with whom
19 he lived, and traded the still photo on Kik for five other
20 still photos depicting child pornography. He did not attempt
21 to interact with any other children and interacted only with
22 adult males on Kik.

23 Instead, Mr. DeVito, who pled guilty to one count of
24 production of child pornography, electronically crept into the
25 bedrooms of more than 25 prepubescent females using apps which

1 he instructed many of them to download. He provided graphic
2 pornography and instruction to more than 25 children. He
3 enticed them to engage in multiple sex acts, including with
4 other young children and with at least one animal, and he saved
5 video recordings and/or screen shots of all these activities
6 which the Court has viewed.

7 I don't think there's -- there are not just 25 victims
8 involved in this case. There's probably a hundred victims
9 because there's a ripple effect. It affects not only the child
10 but her parents and her siblings; that that child is never
11 going to feel safe again from somebody like Mr. DeVito. And
12 their families have to live with the feeling that they just
13 didn't do enough, even though they thought they did everything
14 they could to protect their child.

15 So this case is definitely out of the ordinary. It's
16 far reaching, and it deserves a maximum sentence.

17 It's the duty of the Court to sentence the defendant
18 at this time. However, counsel will have a final chance to
19 make legal objections before the sentence is actually imposed.

20 Pursuant to the Sentencing Reform Act of 1984 and 18
21 U.S.C. Section 3553(a), it's the judgment of the Court that the
22 defendant, Richard Lee DeVito, is hereby committed to the
23 custody of the United States Bureau of Prisons to be imprisoned
24 for a term of 360 months. Upon release from imprisonment, the
25 defendant shall serve a term of supervised release of life.

1 Within 72 hours of release from imprisonment, the
2 defendant must report to the Probation Office in the district
3 to which he's released.

4 While in the Bureau of Prisons, it's recommended the
5 defendant participate in mental health treatment and sex
6 offender treatment; if he needs it, substance abuse treatment;
7 an apprenticeship program and any available educational
8 opportunities.

9 While on supervised release, the defendant must not
10 commit another federal, state, or local crime. The defendant
11 shall be prohibited from possessing a firearm, ammunition,
12 destructive device, or dangerous weapon. The defendant must
13 not unlawfully possess a controlled substance. The defendant
14 must refrain from any unlawful use of a controlled substance.
15 The Court finds a low risk of future substance abuse on the
16 part of the defendant. Therefore, pursuant to 18 U.S.C.
17 Section 3583(d), the Court waives the requirement of mandatory
18 drug testing.

19 The defendant must cooperate in the collection of DNA
20 as directed by the probation officer.

21 And the defendant must comply with the requirements of
22 the Sex Offender Registration and Notification Act, called
23 SORNA, as directed by the probation officer, the Bureau of
24 Prisons, or any state sex offender registration agency in which
25 the defendant resides, works, is a student, or was convicted of

1 a qualifying offense.

2 The defendant must comply with the standard conditions
3 of supervised release that have been adopted by this Court as
4 well as the following special conditions. One: The defendant
5 shall not possess or view sexually explicit material as defined
6 by 18 U.S.C. Section 2256(2)(A) and (B).

7 Two: The defendant shall participate in a sex
8 offender treatment program, to include a sex offender risk
9 assessment, psychosexual evaluation, and/or other evaluation as
10 needed.

11 Three: The defendant shall also be subject to
12 periodic polygraph examinations at the direction and discretion
13 of the probation officer and at the defendant's expense. The
14 defendant shall follow the rules and regulations of the sex
15 offender treatment program as implemented by the Probation
16 Office. The defendant shall sign all necessary authorization
17 forms to release confidential information so that treatment
18 providers, probation officers, polygraph examiners, and others,
19 as necessary, are allowed to communicate openly about the
20 defendant and his relapse prevention plan.

21 Four: The defendant's residence and employment shall
22 be preapproved by the probation officer and in compliance with
23 state and local law.

24 Five: The defendant is required to install software
25 to monitor computer activities on any computer the defendant is

1 authorized to use at the defendant's own expense. The software
2 will record any and all activity on the defendant's computer,
3 including the capturing of keystrokes, application information,
4 internet use history, e-mail correspondence, and chat
5 conversations. This software will be checked on a random
6 basis. The defendant has no expectations of privacy regarding
7 computer use or information stored on the computer if
8 monitoring software is installed and understands and agrees
9 that information gathered by said software may be used against
10 the defendant in subsequent court actions regarding the
11 defendant's computer use and conditions of supervision. The
12 defendant must also warn others of the existence of the
13 software program. The defendant is prohibited from attempting
14 to remove, tamper with, or alter or circumvent in any way the
15 software program. Furthermore, the defendant must comply with
16 the rules set forth in the computer monitoring participation
17 agreement.

18 Six: The defendant shall submit and/or surrender any
19 media device to which he has access and/or control to a search
20 based on reasonable suspicious or contraband or evidence of a
21 violation of a condition of supervision. A media device is
22 defined as, but not limited to, any device which is capable of
23 accessing the internet, storing images, texts, or other form of
24 electronic communication.

25 Mr. DeVito shall pay \$10,400 in restitution to Minor

1 Victim P. A determination with respect to any additional
2 restitution is pending receipt of additional information from
3 victims in this case. Additional information will be provided
4 to the Court by the Probation Department once it is received.

5 While incarcerated, if the defendant is working in a
6 non-UNICOR or grade five UNICOR job, the defendant shall pay
7 \$25 per quarter towards his restitution obligation. If working
8 in a grade one to four UNICOR job, the defendant shall pay 50
9 percent of his monthly pay towards defendant's restitution
10 obligation. Any change in this schedule shall be made only by
11 order of the Court. Within 60 days of the commencement of the
12 term of supervised release, the probation officer shall
13 recommend a payment schedule to the Court to satisfy any unpaid
14 balance of the restitution. The Court will enter an order
15 establishing a schedule of payments.

16 Pursuant to 18 U.S.C. Section 3612(f)(3)(A), the Court
17 waives the requirement of interest on any balance of the
18 restitution not paid within 15 days after judgment.

19 It is ordered the defendant pay a special assessment
20 in the amount of \$100 which shall be due immediately. The
21 probation officer does not believe the defendant has the
22 financial resources to pay the additional \$5,000 special
23 assessment.

24 The defendant shall forfeit the following to the
25 United States: An iPhone 6, Model A1549, IMEI, with a number

1 of numbers to follow; an HP Pavilion laptop of a certain model
2 and serial number; and all additional items that were seized,
3 including, but not limited to, all storage media, micro SD
4 card, eight millimeter videotapes, zip drives, CDs, mini CDs,
5 CDRs, DVDs, mini DVDs, floppy disks, VHS tapes, and cassette
6 tapes, documents, packages and photographs, and all
7 pornographic material, whether depicting adults or minors or
8 both, and all photographs which depict minors other than
9 photographs of clothed minor members of the defendant's family.

10 And, finally, the Court considers the sentence to be
11 just and reasonable in light of the defendant's conduct and the
12 applicable sentencing factors.

13 Mr. DeVito, I can make a recommendation as to which
14 prison facility you be sent to. I know that you wrote in your
15 memo that you'd like to go to either Ashland or Lexington. Is
16 that still your wish? I'll recommend that.

17 THE DEFENDANT: Yes.

18 MS. KOVOOR: Yes, Your Honor.

19 THE COURT: All right. Do you want the Court to
20 recommend that you participate in the substance abuse program?

21 (Ms. Kovoar conferring with the defendant.)

22 THE COURT: There are two programs. There's a
23 500-hour program and a 40-hour residential program.

24 (Defendant conferring with Ms. Kovoar.)

25 MS. KOVOOR: Yes, Your Honor.

1 THE COURT: All right. The Court will recommend both
2 programs.

3 I can recommend that he participate in any type of
4 apprenticeship program. Do you want that?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. I'll also recommend that you
7 participate in the sex offender treatment program offered by
8 the Bureau of Prisons.

9 And do you want mental health treatment?

10 THE DEFENDANT: Yes.

11 MS. KOVOOR: Yes, Your Honor.

12 THE COURT: All right. The Court will recommend all
13 of those things.

14 Ms. Kovoar, do you have any objections as to why the
15 sentence should not be imposed as stated?

16 MS. KOVOOR: No, Your Honor.

17 THE COURT: Mr. Healey, any objections?

18 MR. HEALEY: No, Your Honor.

19 THE COURT: The sentence is thus imposed as stated.

20 Let me tell you about your rights on appeal.

21 Under some circumstances, a defendant has a right to
22 appeal the sentence. However, a defendant may waive that right
23 as part of a plea agreement, and you have entered into a plea
24 agreement which waived some or all of your rights to appeal the
25 sentence itself. Such waivers are generally enforceable, but

1 if you believe the waiver itself is not valid, you can present
2 that theory to the appellate court.

3 If you can't afford a lawyer, you may apply, and one
4 will be appointed to represent you on your appeal.

5 You're further advised that in accordance with the
6 provisions of Rule 4(b) of the Rules of Appellate Procedure,
7 you must file your notice of appeal with the Clerk of the
8 United States District Court within 14 days of the filing of
9 this judgment.

10 The Court does hereby advise that if you so request,
11 the Clerk of this Court will prepare and file immediately a
12 notice of appeal on your behalf. Do you wish the Clerk to do
13 that?

14 MS. KOVOOR: Yes, Your Honor.

15 Also, if he could be appointed counsel for appeal.

16 THE COURT: All right. It's further ordered that the
17 defendant shall notify the United States Attorney for the
18 Southern District of Ohio within 30 days of any change in
19 resident or mailing address until the restitution imposed by
20 this judgment is fully paid.

21 I know that Mr. DeVito is in the custody of the United
22 States Marshal. I'm going to remand him to the custody of the
23 Marshal.

24 Is there anything further to come before the Court in
25 this matter?

1 MS. KOVOOR: Your Honor, could he -- I just wanted to
2 ask whether he could say good-bye to his wife and his mother?
3 That's defendant's request. I'm just --

4 THE COURT: The Marshals won't let me have any contact
5 with anyone. Sorry.

6 MS. KOVOOR: And I would want to order the transcript
7 and have appointed counsel.

8 THE COURT: You want to order the transcript and what?
9 What else?

10 MS. KOVOOR: And have counsel appointed for --

11 THE COURT: And have counsel appointed. Okay.

12 All right. Good luck to you, Mr. DeVito.

13 (Proceedings concluded at 2:21 p.m.)

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15

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct transcript
18 from the record of the proceedings in the above-entitled
19 matter.

20 s/Julie A. Wolfer
Julie A. Wolfer, RDR, CRR
21 Official Reporter
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